ARTICLES

JUSTICES DENIED: THE PECULIAR HISTORY OF REJECTED UNITED STATES SUPREME COURT NOMINEES

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I. INTRODUCTION

Throughout the 2016 election year’s drive to the White House, a far different building loomed large in the passenger’s side window. More than any presidential candidates in recent memory, the 2016 election year’s aspirants for the nation’s highest executive office focused their rhetoric upon the kingpin of the federal judiciary. During the election, now-President Donald Trump publicly vowed to “appoint justices to the United States Supreme Court who [would] uphold our laws and our Constitution,” stated that “Second Amendment people” could stop Hillary Clinton’s Supreme Court picks, and released a list of justices whom he purportedly planned to consider nominating to the Court’s bench.1 On the other hand, Democratic nominee Hillary Clinton declared that she would nominate only justices who were willing to overturn the Court’s controversial Citizens United decision regarding corporate campaign contributions, criticized the Court’s precedent regarding the Second Amendment, and denounced Trump’s list of prospective nominees.

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as littered with “extreme ideologues.” Other candidates on both sides of the political aisle provided similarly pointed comments throughout the primary season.\(^3\)

In this manner, the arm of government that Alexander Hamilton once called the least dangerous branch in the federal system stole the spotlight in the 2016 election.\(^4\) The group of arbiters whom Hamilton hoped would lack both “the power of the executive branch and the political passions of the legislature” proved in 2016 that it wields enough power to consume the minds of executive branch candidates and inflame arguably more political passions than the entire Congress.\(^5\) One could reasonably argue that the 2016 election demonstrated that the Supreme Court today occupies a more unabashedly prominent place in American politics than the body has ever held at any prior point in history.\(^6\)


\(^5\) Alexander Hamilton devoted Federalist No. 78 to a detailed reassurance to skeptics about the limits of the Supreme Court’s power and influence. See THE FEDERALIST NO. 78, at 393 (Alexander Hamilton) (Garry Wills ed., 1982). His commentaries about the Court and the need for limits upon its power remain a central focus of many advocates for “judicial restraint” in the present day. See, e.g., Ian Millhiser, We May Be Living in the Final days of the Supreme Court of the United States, THINKPROGRESS (Nov. 1, 2016), https://thinkprogress.org/we-may-be-living-in-the-final-days-of-the-supreme-court-of-the-united-states-acdcd26e745d#.7pb3059it.

\(^6\) See, e.g., Ari Berman, The Supreme Court is the Most Important Issue in the 2016 Election, NATION (Feb. 16, 2016), https://www.thenation.com/article/the-supreme-court-is-the-most-important-issue-in-the-2016-election/; Dave Helling, Courts, Judges Become Top
President Donald Trump, the victor of the 2016 election, has almost certainly claimed as a prize an embarrassment of judicial spoils. First on the list was the seat vacated by the unexpected death in February 2016 of Justice Antonin Scalia, the longtime ideological heart of the Court’s conservative wing. When the United States Senate refused to entertain former President Obama’s nomination of Merrick Garland to fill this suddenly open position, claiming that it was improper to do so in an election year, the ability to replace Scalia shifted to the White House’s newest inhabitant, who responded by appointing conservative jurist Neil Gorsuch to the bench. This appointment alone represented an opportunity that would please any Republican President and his or her political party—the chance to solidify a predictable right-wing vote.
Barring an unexpected turn of events, however, more openings on the Court is most likely to soon arise for the new President. On Inauguration Day in 2017, liberal leader Justice Ruth Bader Ginsburg had reached the age of eighty-three. Justice Anthony Kennedy, by far the most unpredictable voter on the bench, is eighty years old. Justice Stephen Breyer, generally a steady liberal voter, is seventy-eight. Of course, nothing requires any of these Justices to leave their seats if they do not choose to do so, and precedent exists for Supreme Court Justices to serve as late as the age of ninety. Still, the odds are good that at least one of these older Justices—and possibly all three—will decide to retire from the bench at some point within the next four years. 


12 See Anthony Kennedy Biography, Acad. Achievement, http://www.achievement.org/autodoc/page/ken0bio-1 (last updated June 26, 2015) (stating that Justice Kennedy was born on July 23, 1936); see generally Jeffrey Toobin, Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court, New Yorker, Sept. 12, 2005 (providing just one of a seemingly endless number of commentaries describing Kennedy’s influential position as the Court’s current “swing vote.”).

13 See Ken I. Kersch, Stephen Gerald Breyer, in Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices 74 (Melvin I. Urofsky ed., 2006) (stating that Justice Breyer was born on August 15, 1938). In the words of one writer, Breyer has evolved into “a worthy liberal intellectual counterpart—and sparring partner—to conservative [Justice Antonin Scalia].” Id. In certain areas, however, such as freedom of speech jurisprudence, Breyer proved through the years to be nearly as much of a “swing voter” as Kennedy, if not more so. See Benjamin Pomerance, An Elastic Amendment: Justice Stephen G. Breyer’s Fluid Conceptions of Freedom of Speech, 79 Alb. L. Rev. 403, 479 (2016) (examining Breyer’s widely varied record in freedom of speech decisions).


If Justices Ginsburg, Kennedy, and Breyer all leave the bench during President Trump’s term of office, President Trump will hold the power of appointing a total of four Supreme Court Justices.\footnote{See Totenberg, supra note 9.} No President since Ronald Reagan has filled four or more vacancies on this powerful bench.\footnote{See Supreme Court Nominations, 1789-Present, U.S. Senate, https://www.senate.gov/pagelayout/reference/nominations/reverseNominations.htm (last visited Nov. 19, 2016) [hereinafter Supreme Court Nominations].} Yet the impact of the new slate of nominees extends far beyond mere numbers. If the above-described scenario comes true, President Trump would replace the Court’s longstanding conservative leader (Scalia), the Court’s two more influential liberal Justices (Ginsburg and Breyer), and—perhaps most importantly—the swing voter on whom so many 5-4 decisions in recent years have hinged (Kennedy).\footnote{See supra text accompanying notes 8–13.} With such a slate of nominees, the President could re-cast the Court’s overall decision-making tendencies in a way that could reverberate for decades to come.\footnote{See Andersen, supra note 4; Berman, supra note 6; Bravin, supra note 7; Cathleen Decker, Scalia’s Death Puts Supreme Court at the Center of the Presidential Campaign, L.A. Times (Feb. 14, 2016), http://www.latimes.com/nation/la-na-scalia-campaign-20160213-story.html; Albert R. Hunt, The Supreme Court Really Matters in This Election, BLOOMBERG (July 3, 2016), https://www.bloomberg.com/view/articles/2016-07-03/the-supreme-court-really-matters-in-this-election; Paul Waldman, Why 2016 Will Be A Supreme Court Election, Week (July 7, 2015), http://theweek.com/articles/564891/why-2016-supreme-court-election; Wheeler, supra note 4.}

For example, if President Trump decides to appoint reliably conservative Justices to fill all four roles, it would give the Court a substantial conservative majority, with the four new conservatives joining Justice Clarence Thomas, Justice Samuel Alito, and Chief Justice John Roberts to reach a 7-2 conservative advantage.\footnote{See Hannah Fairfield & Adam Liptak, A More Nuanced Breakdown of the Supreme Court, N.Y. Times (June 26, 2014), http://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html.} Conversely, if President Trump appointed four Justices who unexpectedly turned out to be reliably liberal voters, it would establish a definite liberal majority on the Court, with the four new jurists joining Justice Sonia Sotomayor and Justice Elena Kagan to form a 6-3 liberal lead.\footnote{See id.; see generally Adam Liptak, The Right-Wing Supreme Court That Wasn’t, N.Y. Times (June 28, 2016), http://www.nytimes.com/2016/06/29/us/politics/supreme-court-term.html (listing Justices Sotomayor and Kagan as liberals on the Court).} The nation’s future direction on multiple keystone issues—immigration reform, gun control, affirmative
action, freedom of expression, campaign finance, and many more—hangs in the balance of President Trump’s selections to rebuild the bench.22

Yet one fundamental entity could block President Trump’s opportunity to reshape the Court: the checks and balances of the United States Senate.23 As of this writing, Republicans hold a 52-48 advantage over Democrats in this legislative chamber.24 However, multiple Senate seats are sure to be contested in future interim elections over the next four years, potentially causing a noticeable shift in the balance of power.25 When the dust settles on these interim elections, President Trump will need to quickly ascertain how to best work with this newly constituted collection of senators to gain their consent for any of his potential judicial nominees.26

22 See Berman, supra note 6; Decker, supra note 19.
23 The U.S. Constitution provides that the President “by and with the Advice and Consent of the Senate . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. CONST. art. II, § 2, cl. 2. This is frequently called the “Appointments Clause.” See, e.g., Jonathan H. Adler, Are the SEC’s Administrative Law Judges Unconstitutional, WASH. POST (Dec. 28, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/28/are-the-secs-administrative-law-judges-unconstitutional/?utm_term=.e5d73ef8d98a. The actual extent of the Senate’s role regarding Supreme Court nominees has long been the subject of debate. See, e.g., Joel B. Grossman & Stephen L. Washby, The Senate and Supreme Court Nominations: Some Reflections, 1972 DUKE L.J. 557, 560. To some commentators, the Senate should “consent” to the President’s nomination unless the nominee is blatantly unfit for office, perhaps explaining why “the Senate has normally limited its inquiry to whether a nominee’s background included training, experience and judicial temperament deemed appropriate for the position.” Id. at 559; see also Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary, 100th Cong. 2916 (1987) (statement of Prof. Paul M. Bator) (“[The Senate should maintain] a heavy presumption in favor of the President’s nominee if that person possesses outstanding professional, intellectual[,] and moral qualifications for the office of Supreme Court Justice.”). Others argue that such a limited interpretation amounts to an abdication of the Senate’s constitutional duties, and call for a far more rigorous vetting of Court nominees. See Grossman & Washby, supra, at 560 (“It should be emphasized at the outset that any such view of the Senate’s function with respect to nominations for the separate judicial branch of the government is wrong and simply does not square with the precedents or with the intention of those who conferred the ‘advice and consent’ power upon the Senate.”); see also Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L. J. 657, 660 (1970) (holding that senators should consider the prospective justices’ policy inclinations in deciding whether or not to approve the nominee to the Court).

25 Id.
26 Prior to the 2016 election, at least one commentator believed that the politically polarized Senate could provide a tremendous stumbling block for the next President’s Supreme Court nominees. See, e.g., Bob Egelko, Senate a Major Roadblock for Next President’s Supreme Court Picks, S.F. CHRON. (Jan. 3, 2016), http://www.sfchronicle.com
The ideological composition of the Senate could—and, viewed solely through a lens of basic political realism, should—influence the way that President Trump makes his choices for the Court’s future. In particular, if the party controlling the Senate differs from the party controlling the White House, one would expect various compromises from President Trump to avoid facing roadblocks and rejections. With such an important opportunity at stake, these are nominations to be handled with particular care.

To shed greater light on key considerations regarding this process, this article investigates the types of situations that any President would most likely wish to avoid. Twelve times in this nation’s history, the Senate voted to reject the President’s nominee for the Supreme Court. This article examines each of these nominees and the factors surrounding their rejections. For each unsuccessful nominee, this article studies the political dynamics of the time: the nominee’s political party, the nominating President’s party, the controlling party in the Senate, and the controlling party on the Supreme Court. The article also looks at the political party membership of the Justice whom the new nominee would replace, as

//politics/article/Senate-a-major-roadblock-for-next-president-s-6734458.php (“With relations between the parties at their most toxic in recent memory, the next Supreme Court nominee may be in for a rough ride.”).

27 Indeed, the entire process began through a vision of compromise, with the framers reaching a middle ground between delegates who wanted all of the appointment power to stay in the executive branch and delegates who wanted all of the appointment power to rest in the legislative branch. See LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, THE IMPORTANCE OF THE SENATE’S CONSIDERATION OF A U.S. SUPREME COURT NOMINEE 4 (2016), https://lawyerscommittee.org/wp-content/uploads/2016/03/LCCRUL-Supreme-Court-Vacancy-Report-March-11_Final.pdf. From the outset, this was meant to be a sharing of powers between these two branches, ensuring that neither party could dominate the appointments process and requiring compromise to reach consensus. See id.

28 Supreme Court Nominations, supra note 17. This article focuses exclusively upon those nominees that the Senate voted to reject. In addition, the Senate has taken no action on ten nominees to the Court: Reuben Walworth (nominated by President John Tyler), John Read Tyler, Edward Bradford (Millard Fillmore), William Micou (Fillmore), Henry Stanbery (Andrew Johnson), Stanley Matthews (Rutherford Hayes) (later confirmed), William Hornblower (Grover Cleveland) (later formally rejected), Pierce Butler (Warren Harding) (later confirmed), John Harlan (Dwight Eisenhower) (later confirmed), and, most recently, Merrick Garland. Id. The Senate has postponed a vote on three additional nominees: John Crittenden (nominated by John Quincy Adams), Roger Taney (Andrew Jackson) (later confirmed), and Edward King (John Tyler). Id. Finally, twelve nominees have withdrawn their nomination before the Senate could vote on them: William Paterson (nominated by George Washington) (later confirmed), Ruben Walworth (twice) (nominated both times by John Tyler), John Spencer (Tyler), Edward King (Tyler), George Badger (Millard Fillmore), George Williams (Ulysses Grant), Caleb Cushing (Grant), Abe Fortas (Lyndon Johnson), Homer Thornberry (Johnson), John Roberts, Jr. (George W. Bush) (withdrew from the nomination to replace Sandra Day O’Connor because William Rehnquist passed away and Bush subsequently nominated Roberts to become the Court’s new Chief Justice instead) (later confirmed), and Harriet Miers (Bush). Id.
well as any unique factors of the former Justice—membership in a racial, ethnic, or religious minority, for instance—that might influence both the President's and the Senate's opinions regarding the new Justice.

From there, the article moves on to review the nominating President's record of prior nominations to the Supreme Court and, given the recent issues regarding the unsuccessful nomination of Merrick Garland, takes note of the number of years between the nomination year and the year of the next presidential election. Last, the article reviews the nominee's overall record, examining the nominee's judicial body of work and political body of work, and takes note of any widely disseminated public sentiments about the nominee.

The article concludes by reviewing the data collected in the preceding sections and identifying trends, parallels, patterns, and characteristics that are common to Supreme Court nominees that the Senate rejected. Through this review, this article will help illuminate pitfalls that President Trump should avoid as well as attributes that he should seek when selecting Supreme Court nominees to place before the Senate's scrutiny. The historical commonalities identified in the next sections of this article could become particularly useful in evaluating the likelihood of confirmation success for the nominees put forth to create a new Court.

II. REJECTED SUPREME COURT NOMINEES AND SOME REASONS WHY

A. John Rutledge

The Senate's first Supreme Court rejection occurred less than a decade after the Constitution's ratification. With a man who warned against partisan politics serving as the chief executive, America's inaugural political divisions emerged in force during the Senate's refusal to confirm John Rutledge to the office of Chief Justice of the Supreme Court. The South Carolina native belongs

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29 Of course, the correlations discussed in this article may not always hold true. Politics is a volatile game, and Supreme Court nominations are, at their core, political. Depending on the President, the Senate, and the various extraneous interests involved, some or all of the trends identified here might not hold true. However, given that the patterns found here encompass twelve nominations occurring across more than two centuries of history, Presidents deciding whom to nominate should grant these factors discussed here careful consideration.

30 See Supreme Court Nominations, supra note 17.

31 See Dennis Jamison, George Washington's Views on Political Parties in America, WASH.
on any honest list of the most influential Founding Fathers of the United States, with a legacy of leadership from the Stamp Act Congress to the First Continental Congress to the constitutional convention. He held high political and judicial posts on both the federal level and the state level. He even previously served briefly as an Associate Justice on the Supreme Court. Yet despite this background—or, perhaps, because of it—this was the first man whom the Senate deemed unfit to approve to the highest judicial post.

Nominee’s Political Party: Federalist.

Nominating President’s Political Party: Technically speaking, George Washington remained independent of any party affiliation during his tenure in office. However, the nation’s first President unquestionably tended to favor Federalist viewpoints.

Majority Party in Senate: Federalist.

Majority Party on United States Supreme Court: Federalist.

Predecessor’s Political Party: Federalist.

President’s Previous Nominations to United States Supreme Court: In addition to Jay and Rutledge, Washington had successfully appointed William Cushing, James Wilson, John Blair, James Iredell, Thomas Johnson, and William Patterson to the Court prior to nominating Rutledge for the Chief Justice’s seat. Another

See generally JAMES HAW, JOHN & EDWARD RUTLEDGE OF SOUTH CAROLINA 14, 29, 35, 71 (1997) (providing a thorough look at Rutledge’s multiple contributions in the formative years of the United States of America).

See infra notes 44–68 and accompanying text.

See infra notes 44–46 and accompanying text.

See supra note 32, at 255–56.


See Jamison, supra note 31.


See HELEN J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 386 (1985) (listing the party affiliation of each Justice appointed to the Supreme Court by Washington); see also Supreme Court Nominations, supra note 17 (providing a list of George Washington’s appointees, all of them Federalist Party members).

See BIRD, supra note 36, at 429 (noting that Jay, like Rutledge, was a Federalist).

See Supreme Court Nominations, supra note 17.
nominee, Robert Harrison, voluntarily declined the appointment, citing health reasons.\textsuperscript{43}

Time Between Nomination Year and Next Presidential Election Year: Approximately eleven months.\textsuperscript{44}

Nominee’s Prior Legal Record: Rutledge studied law at London’s Middle Temple and rapidly rose to become one of South Carolina’s most sought-after attorneys.\textsuperscript{45} Washington’s decision to appoint Rutledge to the Supreme Court in 1789 was unsurprising, given the widespread respect that his legal acumen commanded.\textsuperscript{46} Yet Rutledge’s tenure on the Court was marked by chronic absenteeism, as the new Justice routinely failed to attend the Court’s meetings and paid little attention to the Court’s business.\textsuperscript{47} After just eighteen months on the bench, he resigned to become Chief Justice of South Carolina’s Court of Common Pleas.\textsuperscript{48}

When Jay resigned from the Chief Justice’s chair, however, Rutledge openly lobbied to become his replacement.\textsuperscript{49} In a letter to Washington, Rutledge declared that he had “no objection to take the place which [Jay] holds.”\textsuperscript{50} The tone of the South Carolina man’s correspondence then became even more audacious, brazenly stating that Washington should have originally chosen him over Jay so that he could have become the nation’s first Chief Justice,\textsuperscript{51} writing:

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\text{[M]any of my friends were displeased at my accepting the office of Associate Judge, . . . conceiving (as I thought, very justly) that my pretensions to the office of Chief Justice were at least equal to Mr. Jay's in point of law-knowledge, with the additional weight of much longer experience and much}
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\textsuperscript{43} See Matthew P. Harrington, The Jay and Ellsworth Courts, in 1 The Supreme Court: Controversies, Cases, and Characters from John Jay to John Roberts 59, 60 (Paul Finkelman ed., 2014).

\textsuperscript{44} See Presidential Elections, History, http://www.history.com/topics/us-presidents/presidential-elections (last visited Nov. 25, 2016); Supreme Court Nominations, supra note 17.

\textsuperscript{45} See Bird, supra note 36, at 429; Haw, supra note 32, at 13–14; Harrington, supra note 43, at 52.

\textsuperscript{46} See Haw, supra note 32, at 221. In response to Washington’s offer of this seat on the Court, Rutledge responded that he had intended to spend the remainder of his life at home in “[e]ase and [r]etirement,” but would accept the job for the good of the nation. Id.

\textsuperscript{47} See id. at 221–22.

\textsuperscript{48} See Harrington, supra note 43, at 55; Swindler, supra note 39, at 534. While such a career move might seem odd today, it made perfect sense in an era in which the United States Supreme Court had yet to gain national prestige. See Harrington, supra note 34, at 55 (“For many jurists of the day, a position on the states’ highest courts offered more lucrative and prestigious employment than service as a member of a federal court that offered little to do and rigorous circuit duty.”).

\textsuperscript{49} See Swindler, supra note 39, at 534.

\textsuperscript{50} Id.

\textsuperscript{51} See id.
greater practice.52

Washington apparently agreed with Rutledge’s own letter of recommendation.53 On July 1, 1795, he informed Rutledge that his commission as the nation’s new Chief Justice would take effect immediately.54 With the Senate in recess, Rutledge could assume his new role right away.55 Still, the recess appointment only delayed the inevitable question of what the legislators would do with Rutledge when they returned.56

Nominee’s Prior Political Record: Rutledge’s political prominence in North America began before the United States of America existed.57 In 1761, he won election to the provincial assembly, establishing himself as a strong public speaker and skillful debater.58 When unrest grew among the colonists, he initially favored reconciliation with the British.59 At the Stamp Act Congress, he chaired a committee that sent a petition to the House of Lords demanding significant economic reforms, yet continued to advocate for the Crown’s governance throughout the colonies.60

At both the First and Second Continental Congresses, Rutledge sustained a moderate stance on most issues related to Great Britain.61 Yet after the colonies declared their independence, he

52 Id. Silently, Rutledge had harbored these feelings since the day that Washington offered the inaugural Chief Justice’s seat to Jay, whom Rutledge deemed under-qualified for the position. See HAW, supra note 32, at 221.


55 See Swindler, supra note 39, at 534 (“[Washington] hastened to accede to Rutledge’s suggestion and grant him a recess appointment, directing that the Secretary of State prepare his commission forthwith.”).

56 See id. (“Having taken the first and third steps in the appointing process, Washington placed himself in a position of depending utterly upon the Senate to take the indispensable middle step.”). Washington strictly relied upon six factors in deciding who to nominate to the Court: “(1) support and advocacy of the Constitution; (2) distinguished service in the Revolution; (3) active participation in the political life of state or nation; (4) prior judicial experience on lower tribunals; (5) either a ‘favorable reputation with his fellows’ or personal ties with Washington himself; [and] (6) geographical ‘suitability.’” ABRAHAM, supra note 40, at 71–72.

57 See, e.g., JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 253 (1996) ("[John Rutledge’s] distinguished career stretched back over twenty-five years [prior to Washington nominating him to the Court].")

58 See Harrington, supra note 43, at 52.

59 Importantly, Rutledge believed that the colonists’ arguments arose solely from their rights as Englishmen, not from the “natural rights” theories favored by individuals such as John Jay and Richard Henry Lee. See Neil L. York, The First Continental Congress and the Problem of American Rights, 122 PENN. MAG. HIST. & BIOGRAPHY 353, 360 (1998).

60 Id. at 363 n.27; see BAKER, supra note 53, at 21; HAW, supra note 32, at 31–32.

61 See, e.g., Harrington, supra note 43, at 52 (“In Congress, Rutledge, like John Jay, was a reluctant revolutionary. He was hesitant about severing all ties with Great Britain and thus supported the Galloway plan of union rather than Patrick Henry’s drive for a complete
helped draft South Carolina’s first state constitution. In 1779, he became the state’s Governor. The Revolutionary War was still raging, and Rutledge seized such a broad range of emergency wartime powers for the state’s executive branch that South Carolinians began calling him “Dictator John.” Despite his heavy-handed ways, he guided South Carolina through the remainder of the war, and oversaw the process of rebuilding the government of a now-independent state.

Yet Rutledge left his most noticeable political impression at the constitutional convention. Chairing the Committee on Detail and serving on five committees in all, he again distinguished himself as an orator and an indefatigable advocate. Like most southern landowners of that era, Rutledge owned slaves, and vigorously insisted that the new federal Constitution refrain from interfering with the slave trade. He successfully opposed proposals that only land owners possess the right to vote, but simultaneously argued that the nation should allow only land owners to hold political office. Less successful was his proposition for a lower house in Congress elected by the state legislatures and an upper house elected by members of the lower house.

Controversial Topics On Which Nominee Held Publicized Stance: Many of Rutledge’s viewpoints that would seem divisive today were not considered particularly troubling in the mid-1790s. Thus, Rutledge’s publicly known opinions about topics such as slavery, electing public officials by processes beyond the popular vote, increasing the power of the state governments in relation to the centralized federal government, and requiring land ownership as a

break.

62 See BAKER, supra note 53, at 21.
63 See Harrington, supra note 43, at 53.
65 See Barnwell, Jr., supra note 64, at 221, 223, 224; Harrington, supra note 43, at 53.
66 See JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY 265 (2006) (“John Rutledge was one of the most active and most influential delegates at the Philadelphia [c]onstitutional [c]onvention.”).
68 See HARLOW GILES UNGER, JOHN MARSHALL: THE CHIEF JUSTICE WHO SAVED THE NATION 155 (2014); see also EDGAR, supra note 67, at 249 (“Any attempt to strike at the heart of the state's economic well-being [including reduction or elimination of the slave trade] would determine, as Rutledge bluntly put it, 'whether the southern states shall or shall not be parties to the Union.'”)
69 See MORTON, supra note 66, at 268, 269.
70 See Harrington, supra note 43, at 54.
prerequisite to attaining political office evidently did not cause him any trouble when the Senate considered his nomination to the Chief Justice’s seat.71

The issues that did turn Rutledge into an object of controversy emerged from one of America’s earliest forays into partisanship politics.72 Within Congress, the Federalist Party gradually split into two parts.73 One faction, the “High Federalists,” tended to side with the viewpoints expressed by Alexander Hamilton, including adopting the call for war against France after France tried to recoup money that it had loaned to Americans during the American Revolution.74 The other component, the “[M]oderate Federalists,” tended to respect France as one of America’s first allies and turned their suspicions on the British government instead.75

Rutledge broke away from the Federalist mainstream and became part of the “moderate” splinter group.76 This move, by itself, angered a number of High Federalist senators.77 Yet Rutledge did not stop there. In 1795, a two-thirds majority of the Senate ratified “Jay’s Treaty,” an agreement that divided up territory with Great Britain and established other conditions meant to bring about peace with America’s one-time rival.78 Certain Moderate Federalists joined the rising Anti-Federalist movement in a strong dislike for Jay’s Treaty.79 To them, the document granted too many concessions to the British, an action which inherently served as a slap in the face to France, the nation that played a pivotal role in supporting the American cause during the Revolution.80

71 None of the sources consulted for this article mention anything about Rutledge’s viewpoints on any of these topics interfering with his nomination chances.
72 See generally Swindler, supra note 39, at 535 (discussing controversy surrounding Rutledge and Jay’s Treaty).
75 See id. at 322; see also Bird, supra note 36, at 429, 430 (discussing views on France and Britain). Pleased by this rapidly deepening schism within the Federalist ranks were the Anti-Federalists, who were now beginning to organize themselves as a separate political party that would ultimately become the Democratic-Republicans. See Swindler, supra note 39, at 535.
76 See Bird, supra note 36, at 429.
77 See id. at 430–31.
78 See James E. Gauch, Comment, The Intended Role of the Senate in Supreme Court Appointments, 56 U. Chi. L. Rev. 337, 358–59 (1989); Swindler, supra note 39, at 535.
79 See generally Bird, supra note 36, at 431 (stating that Jay’s Treaty tested the loyalty of many Federalists).
Yet no Moderate Federalist or Democratic-Republican publicly employed rhetoric as extreme as the statements that Rutledge delivered on July 16, 1795. At a public meeting protesting Jay’s Treaty, the newly appointed Chief Justice of the United States rose to speak. He began by disparaging the treaty as: “[A]n humble acknowledgment of our dependence upon [the king]; a surrender of our rights and privileges, for so much of his gracious favour as he should be pleased to grant.” He announced that the treaty made America appear weak on the international stage. He even declared that “[h]e had rather the President should die, dearly as he love[d] him, than he should sign that treaty.”

When news of Rutledge’s statements about Jay’s Treaty reached the public, the Chief Justice suddenly became one of the new nation’s most controversial public figures. In the words of Rutledge historian James Haw, “Rutledge had unwittingly put himself in outspoken opposition to a major initiative of the administration that had just nominated him to high office.” His judicial career—and, indeed, his life—would never be the same again.

Public Sentiment Regarding Nominee: Until July 1795, Rutledge was publicly regarded as one of the finest statesmen of the era. Although he was outspoken, his viewpoints were considered well-reasoned, and he received respect even from most of the people with political fault line between Federalists and supporters of Jefferson’s newly formed Democratic-Republican party . . . .”). Some Moderate Federalists left their party entirely and joined Jefferson’s Democratic-Republicans solely over the issue of Jay’s Treaty. See generally, Swindler, supra note 39, at 535 (describing the number of Democratic-Republicans at the time of the Rutledge vote and Jay’s Treaty).

82 See Harrington, supra note 43, at 55.
83 HAW, supra note 32, at 248.
84 See Gauch, supra note 78, at 359; see generally EDGAR, supra note 67, at 253 (stating that Rutledge denounced the treaty).
85 HAW, supra note 32, at 249.
86 See, e.g., BAKER, supra note 53, at 21 (“Rutledge seemed blind to the fact that the President had supported—and the Senate had recently consented to—that difficult treaty.”); EDGAR, supra note 67, at 253 (stating that Rutledge’s rejection occurred solely because of his public opposition to Jay’s Treaty); Swindler, supra note 39, at 535 (“[A] speech by a man just advanced to the nation’s highest judicial post by the administration, and himself at least nominally a Federalist, stunned the administration followers in the Senate.”); Gauch, supra note 78, at 359 (“Because Washington’s followers regarded support of the treaty as ‘the touchstone of true Federalism,’ they opposed the nomination of Rutledge to the position of Chief Justice despite Washington’s support.”).
87 HAW, supra note 32, at 250.
88 See, e.g., supra notes 31–33, 57–66 and accompanying text.
whom he disagreed. While he gained a reputation for heavy-handed behavior during his tenure as South Carolina’s Governor, his ability to successfully lead South Carolina during a time of war ultimately led to overall public forgiveness for such tactics.

All of this changed after Rutledge spoke against Jay’s Treaty. As soon as the public learned what Rutledge had said, key Federalist leaders turned against the newly appointed Chief Justice, even though he was a member of their party. “Rutledge’s worst enemies became the Federalist newspapers,” wrote historian Wendell Bird. Articles in the Federalist papers proclaimed that his speech consisted of “the silliest expressions that ever fell from human lips.” One widely reprinted piece attacked his competency, stating that his legal abilities were “not very far above mediocrity.” Others called him “deranged in his mind” and spread rather vague rumors about Rutledge’s alleged immorality and fraudulent past.

Several leading Federalists lined up to distance themselves from Rutledge. Hamilton published editorials in several newspapers ostracizing Rutledge, stating that Rutledge’s “delirium of rage” over the Jay Treaty had brought “mortification” upon the Federalist Party. Oliver Wolcott called Rutledge a “driveller and fool.” William Davie, a future American envoy to France, asked sarcastically whether Rutledge “raves on the bench as he does at a town meeting.” Even John Adams referred to Rutledge’s behavior as “seditious.”

The criticism of Rutledge’s fateful speech was not unanimous, though. Individuals who shared Rutledge’s distaste for Jay’s Treaty and who were willing to risk their careers by agreeing to share this

89 See supra notes 31–34 and accompanying text.
90 See supra notes 62–65 and accompanying text.
92 Bird, supra note 36, at 431.
93 Id.
94 Id. at 432.
95 Id.
96 Id. at 431.
97 Id.
98 Id. Still another declaration against Rutledge’s sanity came from William Bradford, who wrote in a letter to Hamilton: “The crazy speech of Mr. Rutledge joined to certain information that he is daily sinking into debility of mind [and] body, will probably prevent him to receiving the appointment I mentioned to you.” Trevor Parry-Giles, To Produce a “Judicious Choice”: Presidential Responses to the Exercise of Advice and Consent by the U.S. Senate on Supreme Court Nominations, in The Prospect of Presidential Rhetoric 99, 106 (James Arnt Aune & Martin J. Medhurst eds., 2008).
99 Bird, supra note 36, at 431.
belief wrote letters or went to the press. In particular, Robert Livingston wrote that he was “sorry for the mortification Rutledge will feel in being made the sport of a party.” On the whole, however, Rutledge’s opponents simply outnumbered these other groups.

In the end, the Senate followed these vehement anti-Rutledge opinions. Fourteen senators voted against Rutledge’s appointment, compared with ten senators voting to confirm him. Only three of the ten senators who voted in favor of Rutledge were Federalists. Three Federalist senators did not show up at all, perhaps preferring not to cast their votes against a nominee from their own political party but not willing to vote in Rutledge’s favor, either. To this day, Rutledge remains the only presidential recess appointment to the Court to be later rejected by Congress. Yet even Rutledge’s longtime acquaintance John Adams claimed that the move was necessary. “[I]t gave me pain for an old [f]riend, though I could not but think he deserved it,” Adams wrote to his wife, Abigail. “C[hief] Justices must not go to illegal [m]eetings and become popular orators in favour of [s]edition, nor inflame the popular discontent"s which are illfounded, nor propagate [d]isunion, [d]ivision, [c]ontention, and delusion among the People.”

For Rutledge, the entire ordeal was too much to bear. Returning to South Carolina, he unsuccessfully attempted suicide in December 1795 by jumping off a wharf. He spent much of the remainder of his life withdrawn and rather isolated in Charleston. Meanwhile, Washington attempted to soothe the various injuries imposed during this battle by reaching into the Senate and nominating the popular Senator Oliver Ellsworth to

100 See id.
101 Id.
102 See Baker, supra note 53, at 21; Edgar, supra note 67, at 253; Haw, supra note 32, at 250; Harrington, supra note 43, at 56; Swindler, supra note 39, at 535.
103 See Supreme Court Nominations, supra note 17.
104 See Swindler, supra note 39, at 535.
105 See id.
107 Letter from John Adams to Abigail Adams (Dec. 17, 1795), in 1 The Documentary History of the Supreme Court of the United States, 1789-1800, at 813, 813 (Maeva Marcus et al. eds., 1985).
108 Parry-Giles, supra note 98, at 106.
109 See generally, Haw, supra note 32, at 257 (discussing Rutledge’s mental and emotional instability).
110 See id. at 257–58.
111 See id. at 259; see also John Rutledge, South Carolina, Constitution Day, http://www.constitutionday.com/rutledge-john-sc.html (last visited Nov. 27, 2016) (describing Rutledge’s final years in which he lived in a secluded setting).
replace John Jay as Chief Justice, a nomination that the Senate overwhelmingly confirmed.\footnote{See Chief Justice Nomination Rejected, supra note 31; see also Supreme Court Nominations, supra note 17 (stating that Ellsworth was confirmed by a vote of 21-1).}

B. Alexander Wolcott

By the time James Madison was inaugurated as America’s fourth President in 1809, the political partisanship that showed its roots in Rutledge’s rejection had blossomed into full bloom. The once-dominant Federalist Party had declined significantly in strength.\footnote{See 4 THE UNITED STATES: ITS BEGINNINGS, PROGRESS AND MODERN DEVELOPMENT 444 (Edwin Wiley & Irving E. Rines eds., 1912) (“[By 1798] the Federalists had become separated into two wings, which differed almost as widely as did the more moderate Federalists from the Republicans.”); see also id. at 444–46 (providing a venerable account of the downfall of the Federalist Party).} Madison and Thomas Jefferson had founded their new Democratic-Republican Party in 1792, creating what most historians consider to be the first formalized opposition party in United States politics, yet it was not until Jefferson defeated John Adams in the bitterly contested presidential election of 1800 that this new party truly gained legitimacy among the American populace.\footnote{See id. at 469. Jefferson frequently referred to his victory as the “Republican Revolution of 1801.” See id.} Initially, the Democratic-Republicans utilized a remarkably well-organized and united mechanism among party loyalists to gain swift dominance in the federal government.\footnote{See LARSEN, supra note 73, at 45, 51. Some Federalists even tried to use the extreme unity of the Democratic-Republican Party as a tool to attack its members, claiming that they were more loyal to the party line than to the well-being of the nation. “The whole body [of the Democratic-Republican Party] act with a union to be expected only from men in whom no moral principles exist,” proclaimed one Republican leader in 1800. Id. at 51.} Yet this unity and organization would not last long. When Madison entered the White House, he received something that most Presidents would consider a great gift: a Congress controlled by members of his own political party.\footnote{See LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 98 (1985) (stating that the Senate’s composition at the time of Alexander Wolcott’s nomination consisted of twenty-eight Democratic-Republicans and only six Federalists); see also Swindler, supra note 39, at 536 (showing the composition of the Senate).} A closer look at that Congress, however, revealed that the Democratic-Republicans were already splintering into their own factions.\footnote{“The friends of this administration will put it down faster than its enemies,” proclaimed Senator Jesse Bledsoe shortly after Madison’s election to the presidency. JEFF BROADWATER, JAMES MADISON: A SON OF VIRGINIA & A FOUNDER OF THE NATION 146 (2012). According to Broadwater: “Divisions among Republicans may have done more damage to Madison’s presidency than did his Federalist opponents.” Id. Factions within the Democratic-Republicans during Madison’s presidency included the “Invisibles” engaged in “backstage
Recognizing these divisions, Madison fought to retain unity among the Democratic-Republican voices.118 Too often, this effort to keep the party together resulted in the President appointing or retaining less-than-competent individuals simply because of their purported party loyalty.119 Perhaps the most egregious of these decisions occurred when Madison appointed James Wilkinson, a military commander who had previously conspired with Aaron Burr to abscond from the United States and carve out a brand new nation in the Southwest, as the leader of the effort to protect the Louisiana coastline from invasion.120 From the outset of this appointment, Wilkinson proved completely ineffective and even harmful to his own soldiers.121 When enough complaints arrived in Washington, Congress spent two years investigating Wilkinson’s military actions, but still failed to reach any conclusive decisions about whether he should remain in command.122 Ultimately, the final decision rested on Madison’s shoulders.123 After weighing the options, Madison allowed Wilkinson to keep his post—not because the President trusted the commander’s aptitude or good character, but rather because Wilkinson was a Democratic-Republican who

maneuvers” from Pennsylvania, Maryland, and Virginia; the “Old Republicans” demanding more limits on federal powers and a preservation of the nation’s agrarian origins; the followers of George Clinton and DeWitt Clinton from New York objecting to Jefferson’s protectionist economic policies; and the “[R]egular Republicans,” who loyally supported Jefferson and Madison and for whose attention the various splinter groups competed throughout Jefferson and Madison’s administrations. See GARRY WILLS, JAMES MADISON 69–70 (2002).

118 See, e.g., WILLS, supra note 117, at 70 (“[Madison’s] temperament and experience made him omnidirectionally deferential. . . . This became apparent with matters like Supreme Court appointments, Yazoo land, the Bank of the United States, and the Floridas.”).

119 See, e.g., BROADWATER, supra note 117, at 147 (“Madison’s tendency to try to work around his opponents, rather than confronting them directly, helps explain his lackluster Cabinet, which contributed to his difficulties.”).


121 See LINKLATER, supra note 120, at 286; WILLS, supra note 117, at 65–67. Half of the soldiers entrusted to Wilkinson’s care either deserted or died from diseases (particularly malaria) after Wilkinson insisted on encamping his troops in a swamp. See WILLS, supra note 117, at 66.

122 See LINKLATER, supra note 120, at 288, 291, 294.

123 See id. at 295.
Madison evidently viewed the United States Supreme Court through similarly politicized eyes. Unlike the legislative and executive branches, the Court had not yet completely shifted to the control of the Democratic-Republicans. Thus, the death of Justice William Cushing, a George Washington appointee who served for twenty-one years on the Court’s bench, became for the President a key political opportunity.

Jefferson even sent a long letter to Madison calling Cushing’s passing a “circumstance of congratulation.” Madison now possessed the power to give his party its long-awaited control over the third branch of government. All he needed to do was make the right choice.

At first, Madison seemingly had identified the perfect selection. Levi Lincoln had served as Jefferson’s first Attorney General and commanded wide respect for his legal knowledge. “He is a sound lawyer,” stated Caesar Rodney, Madison’s Attorney General, “and what is more, an upright honest man.” Furthermore, Lincoln was “a firm unequivocating Republican” who had founded the National Aegis, one of the most influential Democratic-Republican newspapers in all of New England. Thus, Madison felt that the

124 See BROADWATER, supra note 117, at 148; WILLS, supra note 117, at 66, 67.
125 See WILLS, supra note 117, at 70 (“Jefferson had been unable to break the Federalist stronghold on the Supreme Court, since he had no opportunity to replace a [J]ustice.”).
126 See William Cushing, 1790-1810, SUPREME CT. HIST. SOCY, http://supremecourthistory.org/timeline_cushing.html (last visited Nov. 27, 2016). Cushing was the last member of Washington’s original Court remaining on the bench. See Supreme Court Nominations, supra note 17.
127 See WILLS, supra note 117, at 70.
128 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 404 (rev. ed. 1928).
129 In a letter to Albert Gallatin, Jefferson again exalted at this newfound opportunity for the Democratic-Republican Party: “At length, then, we have a chance of getting a Republican majority in the Supreme Judiciary. “For ten years that [b]ranch has braved the spirit and will of the [n]ation after the [n]ation has manifested its will by a complete reform in every branch depending on them.” Id. at 403. He went on to call Cushing’s death and the ensuing Court vacancy a “Godsend.”
130 See id. Madison, however, evidently harbored initial doubts about Lincoln’s fitness to serve as a judge. Jefferson acknowledged this in a letter to the President, stating: “I know you think lightly of him as a lawyer; and I do not consider him as a correct common lawyer, yet as much so as anyone who ever came, or ever can come, from one of the eastern [New England] states.” WILLS, supra note 117, at 71.
131 See ABRAHAM, supra note 40, at 88; BROADWATER, supra note 117, at 148; THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 586–87 (Kermit L. Hall et al. eds., 2d ed. 2005) [hereinafter OXFORD COMPANION].
132 See WARREN, supra note 128, at 404 n.2.
133 See id. at 404 n.1; see also ABRAHAM, supra note 40, at 88 (“[Lincoln’s] dedication to Democrat-Republicanism was beyond question.”); 2 CHARLES NUTT, HISTORY OF WORCESTER AND ITS PEOPLE 1116 (1919) (stating that National Aegis was founded as a means of support for Jefferson and that Levi Lincoln was one of its editors).
man from Massachusetts possessed the ideal combination of characteristics: a stellar reputation that would prevent even Federalist politicians from opposing him and a devotion to his party that would give the Democratic-Republicans a steadfast advantage on the Court.\footnote{Without a doubt, Jefferson’s fingerprints were deeply embedded in this viewpoint and the decision to nominate Lincoln to the Court. See, e.g., \textsc{Warren}, supra note 128, at 402–04 (stating that Lincoln was Jefferson’s first choice and that Jefferson wrote to Madison to advocate for the nomination of Lincoln, citing Lincoln’s republicanism and integrity).}

There was only one problem. Lincoln was sixty-two years old at the time of Cushing’s death, and his health was failing noticeably.\footnote{See \textsc{Abraham}, supra note 40, at 88. This fact was of no surprise to Madison, who was forewarned that Lincoln might decline the appointment to the Court because of age and increasing infirmity. See id. \footnote{See \textsc{Wills}, supra note 117, at 71.}} In particular, his eyesight had declined so much that he was nearly blind.\footnote{See \textsc{Wills}, supra note 117, at 71.} This fact did not bother Madison, who proceeded to nominate Lincoln to the Court anyway.\footnote{See \textsc{Warren}, supra note 128, at 409.} Yet it certainly troubled Lincoln, who feared that he lacked the physical capacity to properly conduct himself as a Justice of the Court.\footnote{See id. \footnote{See \textsc{id.} at 408–10; \textsc{Oxford Companion}, \textit{supra} note 131, at 586–87.}} After a lengthy personal deliberation, and after multiple attempts by Madison, Rodney, and many other influential Democratic-Republicans, Lincoln ultimately decided to decline the appointment.\footnote{See \textsc{id.}}

Lincoln’s declination sent Madison’s prospects for altering the Court into a sudden tailspin.\footnote{See \textsc{Henry Adams}, \textit{History of the United States of America During the Administrations of James Madison} 249 (Earl N. Harbert ed., 1986) (describing the various machinations that occurred after Lincoln declined Madison’s offer); see also \textsc{Oxford Companion}, \textit{supra} note 131, at 587 (noting the likely ideological effect on the Court if Lincoln had decided to accept the President’s appointment); \textsc{Warren}, supra note 128, at 410–11 (discussing the events after Lincoln declined the appointment).} He wanted to nominate a New England man to the bench, partly because he wanted to replace the Massachusetts-born Cushing with another New Englander and partly because he wanted to establish Democratic-Republican control throughout that region.\footnote{See \textsc{Broadwater}, \textit{supra} note 117, at 148. Furthermore, given that Supreme Court Justices were obligated during this era to “[ride] circuit in their districts,” replacing the departed Cushing with another jurist from his geographic region was a logistically sensible move. See \textsc{Wills}, \textit{supra} note 117, at 70.} Unfortunately, with Lincoln now out of the picture, New England offered Madison very few palatable alternatives.\footnote{See, e.g., \textsc{Adams}, \textit{supra} note 140, at 249 (summarizing the scarcity of qualified candidates among Democratic-Republicans in the New England states).}

Federalists still controlled much of the bench and bar in the New
England states. At one time, former Massachusetts Attorney General Barnabas Bidwell might have been a logical pick, but allegations that he had illegally used state resources had sent him fleeing into hiding in Canada. Gideon Granger, a Connecticut lawyer known for his fiery essays defending Democratic-Republican causes, was another possibility, but Madison ultimately vetoed him because Granger had represented several plaintiffs in a particularly controversial land claims case in Georgia, thus making him a candidate to be rejected by senators from the South. A third option was Joseph Story, a young but unquestionably brilliant Massachusetts attorney. Yet Story was extraordinarily outspoken, and was unafraid to object vociferously even to Democratic-Republican positions on important issues. In particular, his multiple attacks on Jefferson’s Embargo Act of 1807 irreparably soured his relationship with the third President. As soon as Story’s name surfaced as a potential candidate for the Court, Jefferson told Madison that Story would never be an acceptable Justice.

Finally, on February 4, 1811, Madison announced his appointment of Alexander Wolcott to become the Court’s newest member. To say that the politicians and the public greeted the news with shock would be a colossal understatement. Wolcott, a longtime Collector of Customs in his home state of Connecticut, was known by few people but seemed to be disliked by many of the people who did know him. He was indeed a devoted Democratic-Republican from New England who solidly supported the party’s platform. Yet in nominating Wolcott to the Court, Madison had

143 See WILLS, supra note 117, at 70. Additionally, even the Democratic-Republicans from this region tended to break with their party on certain crucial issues, including opposing the Embargo Act, the drafting and enactment of which Jefferson had overseen. See OXFORD COMPANION, supra note 131, at 983.
144 See ADAMS, supra note 140, at 249. Initially, Lincoln recommended Bidwell to replace him as the nominee. WILLS, supra note 117, at 71.
145 See WARREN, supra note 128, at 404–05.
146 See ADAMS, supra note 140, at 249.
147 See, e.g., OXFORD COMPANION, supra note 131, at 983, 984.
148 See ADAMS, supra note 140, at 249; BROADWATER, supra note 117, at 148–49; OXFORD COMPANION, supra note 131, at 983.
149 See WARREN, supra note 128, at 406. Among other things, Jefferson referred to Story as “a tory” and claimed that Story was “too young” to serve on the Court. Id.
151 See ADAMS, supra note 140, at 249; WARREN, supra note 128, at 411.
152 See BROADWATER, supra note 117, at 148.
153 See WILLS, supra note 117, at 71–72 (“One specimen, Alexander Wolcott, met the criteria all too well—he had organized the Republican Party in Connecticut and been a
chosen a man who was in many ways Levi Lincoln’s antithesis. The Democratic-Republican-controlled Senate now needed to decide what to do with this member of their own ranks.

Nominee’s Political Party: Democratic-Republican.
Nominating President’s Political Party: Democratic-Republican.
Majority Party in Senate: Democratic-Republican.
Majority Party on the United States Supreme Court: None. The seven-member Court was (after Cushing’s death) even divided among Federalists John Marshall, Bushrod Washington, and Samuel Chase, and Democratic-Republicans Henry Livingston, William Johnson, and Thomas Todd.
Predecessor’s Political Party: Federalist.
President’s Previous Nominations to United States Supreme Court: Levi Lincoln (declined).
Number of Years between Nomination Year and Next Presidential Election: Approximately twenty months.
Nominee’s Prior Legal Record: Wolcott had never served in a judicial post prior to his nomination to the Supreme Court. As a lawyer, his overall reputation as a private practitioner in Massachusetts and Connecticut paled in comparison with that of Levi Lincoln, as well as that of Joseph Story.
Nominee’s Prior Political Record: From 1796 to 1801, Wolcott served as the Democratic-Republican leader in the Connecticut General Assembly. After Jefferson’s presidential triumph in the election of 1800, Wolcott’s political influence in his home state...
increased further, serving as one of the primary people whom Jefferson's Administration consulted regarding political appointments in Connecticut.\textsuperscript{165}

Wolcott's primary political role, however, came as the Collector of Customs in Middletown, a position that Jefferson granted to him in July 1801.\textsuperscript{166} Wolcott would hold this job until his death.\textsuperscript{167} These lucrative positions were often a highly prized reward for party loyalty, and there is no reason to suspect that Wolcott's appointment to this post came because of any alternative reasons.\textsuperscript{168}

However, Wolcott's devotion to Democratic-Republican—and, in particular, Jeffersonian—positions would ultimately become his downfall, as he supported a particular Jeffersonian policy with an unquestioning vigor that even certain members of his own party could not stomach.\textsuperscript{169}

**Controversial Topics On Which Nominee Held Publicized Stance:**

As a customs inspector, Wolcott was an inherently controversial figure.\textsuperscript{170} Many individuals at the time displayed the type of disdain for such individuals that the Christian Bible reserved for tax collectors and money changers.\textsuperscript{171} Wolcott, however, appeared to be even more disliked than most customs inspectors because of his dogmatic party loyalties and, in particular, because of his unyielding enforcement of the Embargo Act of 1807.\textsuperscript{172}

When tensions between France and Great Britain inflamed in the early 1800s, the two European countries engaged in a bitter economic struggle.\textsuperscript{173} Each nation imposed a series of fiscal obstructions, sanctions, and even blockades enforced by military power, aimed at starving the other land into submission.\textsuperscript{174} Caught
in the middle of this costly chess game was the United States, whose trade vessels were seized by naval warships from both nations. 175

In an attempt to force Britain and France to respect American neutrality and to allow the United States to trade in Europe unscathed, Jefferson brought to Congress a measure that closed all American ports to export shipping. 176 Congress quickly passed this embargo, which went into effect immediately. 177 The following year, Jefferson enacted a new law ensuring that any Embargo Act violators were punished harshly. 178 Under these extreme restrictions on trade, American farmers suffered financially. 179 Mercantile leaders in New England and New York faced newfound hardships as well. 180 Among these large groups, the Embargo Act was not only an extraordinarily unpopular measure, but an example of the type of economic downfall that an overbearing centralized government could create. 181

As a customs inspector, Wolcott dealt with the Embargo Act’s provisions on a daily basis. 182 By all accounts, his enforcement of the Act was “robust” and “vigorous.” 183 His force in enforcing the letter of this law made him unpopular not only among political rivals, but among certain Democratic-Republican leaders as well. 184 Thus, Wolcott came before the Senate as a Supreme Court nominee who had become the face of one of the most unpopular political


175 See MEACHAM, supra note 174, at 425.
176 See id. at 430.
177 See id.
178 See id. at 430, 431.
179 See PATRICIA L. DOOLEY, THE EARLY REPUBLIC: PRIMARY DOCUMENTS ON EVENTS FROM 1799 TO 1820, at 201 (2004). New England residents engaged in the fishing and seafaring trade quickly suffered adverse effects from the embargo, too. See id.
180 See APPLEBY, supra note 173, at 127–28; DOOLEY, supra note 179, at 201.
181 See DOOLEY, supra note 179, at 205–06; MEACHAM, supra note 174, at 431 (“The embargo turned American politics upside down. Jefferson became the explicit advocate of strong central power. Republicans who favored less government became the most meddlesome of regulators.”).
182 See PHILLIP I. BLUMBERG, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW 159 & n.37 (2010) (stating that Wolcott was well paid from the Democratic-Republican leadership to carry out these laws. He made approximately three thousand dollars per year in fees, nearly as much as a United States Supreme Court Justice made during this era); GYH, supra note 150, at 188.
183 See Rhodes, supra note 170, at 551 (“President James Madison’s nomination of Alexander Wolcott was likewise rebuffed in part due to the Senate’s objections to his robust partisan enforcement of the Embargo and Non-Intercourse Acts as a United States custom inspector.”); OXFORD COMPANION, supra note 131, at 935.
184 See GYH, supra note 150, at 188; Rhodes, supra note 170, at 551; Swindler, supra note 39, at 535.
moves in the young nation’s history.185

Public Sentiment Regarding Nominee: Media criticism toward Wolcott quickly became even stronger than the press’s sentiments about Rutledge.186 “Even those most acquainted with modern degeneracy were astounded at this abominable nomination,” exclaimed the editors of The Columbia Sentinel.187 A journalist opined that Wolcott was “barely qualified to discharge the duties of a justice of the peace in a country town,” and thus was certainly unfit to “decide in the first instance upon commercial and legal questions of the greatest extent and consequence.”188 The New-York Gazette Advertiser published similar views immediately after learning of Wolcott’s nomination: “Oh degraded Country! How humiliating to the friends of moral virtue—of religion and of all that is dear to the lover of his Country!”189

In his home state of Connecticut, the press exhibited particular venom toward Wolcott, levying strong words at the man who had for years collected tariffs, levied fines, and rigorously instituted the Embargo Act’s provisions in their region.190 “We hope that even in the ranks of democracy, a man might have been found, whose appointment would have been less disgusting to the moral sense of the community,” declared the Connecticut Courant.191 A separate article in the same newspaper went a step further, painting Wolcott as an enemy of free trade and commerce who became wealthy on others’ misfortunes:

For about ten years past, this man has been fattening upon an office, the emoluments of which were derived solely from commerce. Yet such is his hostility to the merchants, . . . that in a public place in this City, a short time since, he remarked “that the merchants of this country had governed it long enough, that they must be put down.” . . . Whether

185 See Geyh, supra note 150, at 188; Warren, supra note 128, at 412; Rhodes, supra note 170, at 551; Swindler, supra note 39, at 535.
186 Compare infra notes 187–92 and accompanying text (providing media criticism of Wolcott), with supra notes 86–89 and accompanying text (providing media criticism of Rutledge).
188 Id.
189 David Holzel, 8 Nominees Who Didn’t Go to the Supreme Court, CNN, http://www.cnn.com/2009/LIVING/wayoflife/07/14/mf.supreme.court.rejections/index.html?iref=nextin (last updated July 14, 2009); see Geyh, supra note 150, at 189 (“[T]he more the man is known, the greater . . . will be our astonishment. Can the public have any confidence in his legal knowledge? Have his friends, of the law, of any party, ventured to hint a word in his favour in this particular?”).
190 See Warren, supra note 128, at 412.
191 Id. at 411 & n.3.
these sentiments or his lamblike temper, his winning manners, his moral character and his legal science were his principal recommendation for the high office to which he is nominated, we shall not attempt to decide.\footnote{Id. at 412 n.1.}

Some loyal Democratic-Republicans attempted to defend the nominee,\footnote{See Swindler, \textit{supra} note 39, at 535.} but uncovered few grounds upon which they could do so. Even Levi Lincoln, the man but for whose declination Wolcott’s nomination never would have occurred, struggled to justify Madison choice.\footnote{See id.} Finally, Lincoln concluded a long letter to Madison with a statement that simultaneously said nothing and everything: “Whatever, therefore, may be his present attainments and legal habits, an industrious application to professional studies and official duties will soon place him \textit{on a level at least}—with his Associates [on the Court].”\footnote{WARREN, \textit{supra} note 128, at 412–13. Modern commentators continue to struggle regarding justifications for Wolcott’s legal merits. See, e.g., OXFORD COMPANION, \textit{supra} note 131, at 935 (“Despite the partisanship of these attacks, they were not far off the mark, and even Republicans found it difficult to defend Wolcott.”); TRIBE, \textit{supra} note 116, at 98 (“[Wolcott] was not up to snuff.”); Swindler, \textit{supra} note 39, at 535–37 (“[E]ven a Jeffersonian Senate could not swallow so mediocre a nominee.”).} From one devout Democratic-Republican to another, it was hardly a ringing endorsement.

Ultimately, the Senate demonstrated that their faith in Wolcott was no greater than any of the public proclamations against the man had indicated. With an overwhelming vote of 24-9, the senators rejected Wolcott’s nomination.\footnote{See OXFORD COMPANION, \textit{supra} note 131, at 935.} In this era of rancorous partisanship, the vote surprisingly reached across the aisle, with nineteen of the twenty-eight Democratic-Republican senators voting against a Democratic-Republican nominee put forth by a President who helped found the Democratic-Republican Party.\footnote{See Anthony Shane Dolgin, \textit{The Expanding Role of the United States Senate in Supreme Court Confirmation Proceedings} (Apr. 1997) (unpublished M.A. thesis, McGill University), http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp01/MQ37201.pdf.}

By all measures, the situation proved to be a tremendous embarrassment for Madison.\footnote{See BRUCE ACKERMAN, \textit{The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy} 232 (2005); ADAMS, \textit{supra} note 140, at 249 (“[Madison] is said to have felt great mortification at this result. The truth seems to be that he is President \textit{de jure} only. Who exercises the office \textit{de facto} I know not, but it seems agreed on all hands that ‘there is something behind the throne greater than the throne itself.’”).} Attempting to rebound quickly from the stinging rebuke, he rapidly announced a new nominee to the
Court: the former Federalist John Quincy Adams. When Adams received this news, he was thousands of miles away from Washington, serving in St. Petersburg as the American minister to Russia. Not wanting to make a transatlantic journey back to Washington with his pregnant wife, Adams turned down Madison’s offer. Finally, desperate to fill Cushing’s seat with a New England Democratic-Republican, Madison realized that he had no other viable choice. Much to his chagrin and Jefferson’s irritation, he nominated the outspoken Story. Within a few days, the man whom Jefferson never wanted to see on the Court received the Senate’s confirmation to join his new colleagues on the bench.

C. John Spencer

On the bitterly cold day of March 4, 1841, William Henry Harrison delivered the longest inaugural address of any President in the history of the United States. One month later, Harrison passed away from pneumonia. For the first time, a Vice President rose to the nation’s highest executive office because of an elected President’s death.

To many Americans, including many American politicians, the new man in the White House was not a genuine President, ascending to the position because of another’s misfortune rather than by the popular vote. Yet John Tyler, suddenly the new

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199 See Adams, supra note 140, at 249.
200 See Broadwater, supra note 117, at 148.
201 See Ackerman, supra note 198, at 232–33; Broadwater, supra note 117, at 148.
202 See id.
203 See Broadwater, supra note 117, at 148–49. In doing so, Madison had to act over Jefferson’s objections, a move that was likely quite difficult for him. See id.
204 Story received confirmation via a voice vote in the Senate on November 18, 1811, just three days after his nomination to the Court. See Supreme Court Nominations, supra note 17.
206 See id. Harrison’s illness is also attributable to being caught in a downpour while taking a long walk to avoid all of the eager office-seekers who crowded around the White House after his election, angling for a political appointment. See Gary May, John Tyler 2–3 (2008). When doctors attempted to treat the President with practically every method known to medicine at that time, the “cures” likely contributed to Harrison’s death as well. See id. at 3.
207 See May, supra note 206, at 1 (“For the first time in American history, a [P]resident had died in office and no one knew precisely what to do about it.”).
208 See Edward P. Crapol, John Tyler: The Accidental President 9 (2006) (“Also of little guidance was the wording of the Constitution, which was vague and ambiguous on the question of succession. It was unclear whether the [V]ice [P]resident became [P]resident in his own right, or whether he was to be the acting [P]resident until a new chief executive was duly elected.”); May, supra note 206, at 5.
President of the United States, took no notice of the detractors who sarcastically anointed him: “His Accidency.”

On his first day in office, he even delivered an inaugural address, vowing his adherence to a strict interpretation of the Constitution and pledging to fight anyone who attempted to supersede the law of the land. From that day forward, he demanded and exercised every right, power, and privilege that any other President had ever received.

At first, members of Tyler's political party, the Whigs, believed that they had gained a loyal partisan in the White House. Tyler, however, rapidly demonstrated that the optimism of these Whigs was badly misplaced. “I am the [P]resident, and I shall be held responsible for my Administration,” he informed the members of his Cabinet. “I shall be pleased to avail myself of your counsel and advice. But I can never consent to being dictated to. . . . [You] must choose between giving [me your] cooperation—or [your resignations].”

The Whigs in Congress tested the courage of Tyler's convictions quickly. Henry Clay, a brilliant orator and the unquestioned alpha dog in the Whig pack, demanded that Tyler sign legislation that would re-charter the Second National Bank of the United States. Tyler, however, believed that the bill violated the rights of the individual states. When he vetoed the legislation, proclaiming

209 CRAPOL, supra note 208, at 9 (“Tyler’s whole course of conduct in the first few days after he arrived in the capital demonstrated plainly that he acted with conscious deliberation to establish himself as a President in his own right and not as a mere caretaker for the departed Harrison.”); see also MAY, supra note 206, at 73 (noting the widespread use of the pejorative nickname ‘His Accidency’ to describe Tyler).

210 See MAY, supra note 206, at 62; see also John Tyler, Address upon Assuming the Office of President of the United States, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=533 (last visited Jan. 24, 2017) (providing the full text of Tyler’s inaugural address). Interestingly, while Tyler constantly billed himself as an ardent strict constructionist, he demonstrated a willingness to interpret the Constitution loosely in his first constitutional choice while in office: the decision that he would serve as a bona fide President rather than merely an acting President. See CRAPOL, supra note 208, at 9.

211 See CRAPOL, supra note 208, at 9–10. Still, for several leading American politicians, including John Quincy Adams and Andrew Jackson, Tyler never attained the legitimacy of an elected President. See MAY, supra note 206, at 5.

212 See MAY, supra note 206, at 5 (“Others believed that Tyler's mild, patrician manner meant that he would be easily controlled . . . . The Whigs believed in a weak presidency dominated by a strong Congress, and [Henry] Clay planned to govern the country from the Senate.”).


214 Id.

215 Id.; see CRAPOL, supra note 208, at 10.

216 See CRAPOL, supra note 208, at 18–19.

217 See id. at 18.
that he questioned whether Congress ever possessed authority under the Constitution to charter a national bank, leaders in the Whig Party publicly denounced Tyler as a traitor.218

Yet Tyler remained unbowed. When the Whigs drafted and passed another bill regarding the National Bank, this time imposing significant limitations on the proposed bank’s powers in an effort to curry Tyler’s favor, the President again vetoed the measure.219 Two days later, every member except one in Tyler’s Cabinet resigned.220 Two days after that, several Whigs in Congress held a meeting at which they proclaimed that Tyler was threatening to “overthrow the present division of [political] parties in the country” and announced that they would seek constitutional amendments to limit the President’s powers based solely on their desire to curb Tyler’s authority.221

From that day forward, Tyler experienced perhaps the most acrimonious relationship that any President has ever held with any Congress.222 The fact that this Congress was dominated by members of his own political party made these hostilities all the more ironic.223 Yet the Whigs refused to forgive Tyler for vetoing the bank bills.224 Meanwhile, other politicians in Congress, upset about Tyler’s support for Whig-initiated measures such as a national bankruptcy act that helped thirty-four thousand Americans discharge $441 million in debts,225 expressed their dislike for Tyler as well.226 As a consequence for ardently following

218 See id. at 19; Jacoby, supra note 213.
219 See MAY, supra note 206, at 72–73.
220 See id. at 74.
222 See, e.g., CRAPOL, supra note 208, at 20 (“In addition to being castigated as a traitor, Tyler also faced assassination threats and was officially drummed out of the Whig Party for allegedly having betrayed the will of the people. Not satisfied with making President Tyler a political outcast, wrathful House Whigs later censured him and unsuccessfully sought his impeachment.”).
223 See, e.g., Jacoby, supra note 213. Even Tyler himself recognized the historic proportions of his rivalry with Congress and with his own party: “I am abused, in Congress and out, as a man never was before,” he wrote in 1842. Id.
224 See CRAPOL, supra note 208, at 20.
225 See, e.g., Peter J. Coleman, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 23 (1974); Robert V. Remini, Henry Clay: Statesman for the Union 597 (1991); Tyler’s Conflicts with Clay’s Whigs, supra note 221.
226 See, e.g., Joshua Kendall, Have We Ever Had a President Like Donald Trump?, NEW REPUBLIC (Mar. 25, 2016), https://newrepublic.com/article/132031/ever-president-like-donald-trump (describing the reasons why Whigs and Democrats alike united over their desire to
his beliefs regarding good government and good governance, Tyler became one of the most politically unpopular Presidents in history.227

Thus, when the time came to nominate someone to the Supreme Court after the death of Justice Smith Thompson, Tyler must have known that he was destined for a fight.228 Perhaps with this impending battle in mind, the President selected for his nominee a longtime ally whose legal qualifications were unquestioned: John C. Spencer of New York.229 If the Senate intended to reject whomever Tyler put forward for this position, they would be forced to do so for reasons other than aptitude about the law.230

Nominee’s Political Party: Whig.231
Nominating President’s Political Party: Whig.232
Majority Party in Senate: Whig.233
Majority Party on United States Supreme Court: The Court was solidly Democratic at this time.234 Chief Justice Roger Taney, as well as Justices Peter Daniel, John McKinley, Joseph Story, John Catron, James Wayne, and Henry Baldwin were all members of the Democratic Party.235 Only Justice John McLean, who changed party affiliation several times during his career, identified with the Whigs at the time of Spencer’s nomination to the bench.236

force Tyler out of the White House).

227 See CRAPO, supra note 208, at 20. In fact, Tyler was forced to form his own political party just to attempt a campaign to win the presidency by popular vote after he finished serving the remainder of Harrison’s term. Id.

228 See, e.g., 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 381 (1922) (“The bitter political feud between President Tyler and the Whigs was now at its height . . . . Any nomination for the [b]ench which he might make was certain to be subjected to searching scrutiny by the Senate.”).

229 See 3 ALDEN CHESTER & E. MELVIN WILLIAMS, COURTS AND LAWYERS OF NEW YORK: A HISTORY 1609–1925, at 1370 (1925) (“[Spencer was] a brilliant New York lawyer.”).

230 However, Spencer was not Tyler’s original choice. Initially, Tyler contemplated nominating a different New Yorker: former President Martin van Buren. At that time, van Buren was contemplating another run for the White House, and Tyler hoped to dissuade him from this enterprise by offering him a seat on the Court. See, e.g., WARREN, supra note 228, at 381–82. Only when New York Senator Silas Wright stated that such a maneuver would “give the whole country a broader, deeper, heartier laugh than it ever had, and at his own expense,” did Tyler decide to nominate Spencer instead. CHESTER & WILLIAMS, supra note 229, at 1370.


232 See id. at 2.

233 See id. at 3.


235 See Compare Supreme Court Justices, supra note 234.

236 See Andrew P. Palmer, John McLean, Associate Supreme Court Justice, WORDPRESS
Predecessor’s Political Party: Democratic.

Number of Years between Nomination Year and Presidential Election Year: Virtually eleven months remained between the date that Tyler nominated Spencer (January 9, 1844) and the end of the next presidential election (December 4, 1844).

Nominee’s Prior Legal Record: Spencer was born into a legally-minded household, as his father, Ambrose Spencer, served as Chief Justice of the New York State Supreme Court. He began his legal practice in the rural community of Canandaigua and quickly emerged as a leader in that region’s bar. He became District Attorney for New York’s five western counties in February 1818, “a position of great responsibility and labor” that the still-young lawyer performed with “great alacrity and success.” From there, he entered the political realm in both the state and federal governments.

Still, while Spencer never held a judgeship, he remained quite active in legal affairs even during his years as a politician. In 1826, he received an appointment from the New York legislature as a special prosecutor to investigate the case of William Morgan, a man kidnapped and murdered for publicly revealing secrets about Masonic rituals. His work on this case led him to become one of the early members of the Anti-Mason political party, a short-lived organization that the Whigs ultimately annexed. Later, after leaving politics following the presidential election of 1852, he became one of three commissioners to oversee revisions of New York State’s legal code—a position, according to at least one commentator, that he received because of his “high standing” as one...
Nominee’s Prior Political Record: Spencer first attained national political office in 1817. Running as a Democratic-Republican, he won election to the United States House of Representatives. During his tenure in this position, he was a member of a committee that reported unfavorably about the activities of the national bank, a fact that likely pleased Tyler when he later reviewed Spencer’s credentials.

From 1820 to 1822, Spencer served in the New York State Assembly, beginning a career in New York State politics that would see him serve in the state’s Senate from 1825 to 1828, the Assembly again from 1831 to 1833, and Secretary of State from 1839 to 1841. During this period in his life, Spencer joined forces with skilled New York politicians such as William H. Seward and Thurlow Weed to become a leader in the state’s Whig Party. His position among the Whigs became prominent enough that he played a leading role in successfully campaigning for Harrison’s election to the presidency—and, by extension, Tyler’s election to the vice presidency.

After Harrison’s death, Spencer initially joined the other Whigs in criticizing Tyler’s policies. Yet the two men evidently reconciled their differences, as Tyler soon appointed Spencer to the Cabinet position of Secretary of War. Unlike the majority of Whig politicians, Spencer refused to break ranks with Tyler at any point following this Cabinet appointment. In a demonstration of faith in Spencer’s abilities and loyalty, Tyler shifted Spencer from leading the War Department to the Treasury Department in 1843. As the

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246 See id.
247 See OXFORD COMPANION, supra note 131, at 816.
249 See id.
250 See id.
251 See HOWELL & TENNEY, supra note 239, at 142; OXFORD COMPANION, supra note 131, at 953–54.
252 See HOWELL & TENNEY, supra note 239, at 142.
253 See id.; WARREN, supra note 128, at 384–85.
254 See HOWELL & TENNEY, supra note 239, at 142; WARREN, supra note 128, at 385.
255 See HOWELL & TENNEY, supra note 239, at 142 (“[T]hough the Whig party dissolved all connection with Tyler, Spencer continued to adhere to him through his administration.”); WARREN, supra note 128, at 385 (stating that Spencer’s opposition to Henry Clay as a presidential candidate led to Spencer’s decision to align himself with Tyler).
256 See CHESTER & WILLIAMS, supra note 229, at 1370; OXFORD COMPANION, supra note 131, at 954. While both of Spencer’s Cabinet appointments were prestigious positions, the fact that Tyler entrusted Spencer to handle some of the most publicly sensitive issues of the day as Secretary of the Treasury seems to have demonstrated the President’s faith in Tyler’s
Secretary of the Treasury, Spencer grappled with a multitude of divisive financial issues, several of which concluded with Spencer receiving enmity from every side of the political aisle.257

Controversial Topics On Which Nominee Held Publicized Stance: Given Spencer’s long career in both state and national politics, his engagement in controversial issues was inevitable at the time Tyler nominated him to the Supreme Court.258 In particular, his actions as Tyler’s Secretary of the Treasury became the subjects of great debate and much opposition.259 With the federal government facing a mounting fiscal deficit, Spencer insisted that the government impose tariffs on imported goods from foreign nations rather than raising taxes.260 His advocacy of substantial duties on items such as coffee and tea proved to be a hotly contested idea.261 Likewise, his issuance of $850,000 in treasury notes to help cover the national government’s debt was unpopular among many politicians.262

The fact that Spencer was one of the few northerners in a leading federal post at a time when southern interests dominated much of the national government’s debates also contributed to his evolving unpopularity in Washington.263 With the issue of slavery increasing in national prominence, he fervently opposed admitting Texas to the Union as a slave state, a stance that certainly did not help his reputation among many politicians from slaveholding states.264

Yet Spencer’s greatest controversy was his continued loyalty to Tyler.265 The fact that he ultimately remained part of Tyler’s Cabinet while other Whigs denounced the President as a traitor did not win Spencer any friends within his own party.266 Thus, much like Tyler, Spencer faced his greatest political challenges from the very politicians whom he once considered his closest allies.267
Public Sentiment Regarding Nominee: As Tyler predicted, no one mounted any serious challenges to Spencer’s legal knowledge or overall qualifications to serve on the Court.268 A correspondent from the New York Herald criticized those senators who opposed Tyler’s nomination, going as far as stating: “[A]ll acknowledge his legal ability to fill with honor the office.”269 Nathan Sargent, one of the leading political historians of the era, wrote that Spencer had carried out his duties as Secretary of the Treasury “with an ability, assiduity, integrity[,] and faithfulness seldom equalled since the days of [Alexander] Hamilton.”270

Still, Spencer’s decision to stay with Tyler after originally criticizing him struck many Whigs, including Clay, as the ultimate form of party betrayal.271 Clay asked: “[D]oes any man believe him true or faithful or honest?”272 Erastus Root of New York claimed that he had “no confidence in the political integrity of Mr. Spencer.”273 Another political leader from Spencer’s home state, Francis Granger, claimed that ninety percent of all Whigs in New York opposed Spencer’s nomination to the Court, adding that the nominee “developed a character that should not be approved by an appointment to one of the most dignified positions in the world.”274 Whigs were ready to desert the party if Spencer was confirmed, Granger continued, stating that the prevailing public attitude was: “[I]f such treachery is to be rewarded by the votes of those who have been betrayed, we do not see any necessity for political integrity.”275

In the end, these political considerations carried the day. On January 31, 1844, the Senate turned down Spencer by a vote of 26-21.276 “The [s]enators felt . . . that our Supreme Court is our last bulwark, our fortress, our rock and tower of defence when all else fails[,]” wrote the New York Herald, “and the vacancy must be filled with a man of diamond purity, and adamantine integrity.”277 Whig Senator John J. Crittenden wrote to Grainger that “the rejection of

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268 See, e.g., CHESTER & WILLIAMS, supra note 229, at 1370. Indeed, quite the opposite was true, as journalists and politicians alike praised Spencer’s track record as a practitioner of law. See, e.g., WARREN, supra note 128, at 386.
269 WARREN, supra note 128, at 386 & n.1.
270 Id. at 385 & n.1.
271 See infra text accompanying notes 272–76.
272 GEYH, supra note 150, at 192. Clay went on to proclaim: “[I]f Spencer [is] . . . confirmed he will have run a short career of more prodigal conduct and good luck than any man I recollect.” WARREN, supra note 128, at 385.
273 CHESTER & WILLIAMS, supra note 229, at 1370.
274 WARREN, supra note 128, at 385–86.
275 Id.
276 See Supreme Court Nominations, supra note 17.
277 WARREN, supra note 128, at 386.
Spencer [was] one of the very best acts of the Senate,” and claimed that “the people everywhere approve his rejection.” Certain people, however, were not so certain. “I perceive that the die is cast and that our friend Spencer is rejected,” wrote Eliphalet Nott, the Presbyterian minister who led New York’s Union College. “So be it, I only hope that a worse man may not be forced, through party animosity, upon the country.”

The rejection appeared not to greatly worry Spencer, who remained in Washington politics for a while and then returned to New York, where he lived comfortably and involved himself again with the state’s legal affairs. For Tyler, however, Spencer’s rejection was only the beginning of an unhappy period where he put forward eight more Supreme Court nominations—including Spencer for a second time—with the Senate approving only one of them, the uncontroversial New York Democrat Samuel Nelson. Interestingly, the Senate never formally rejected Tyler’s other nominees. Instead, they either publicly declared their intentions to vote against the nominees until Tyler withdrew them or simply did nothing until the session of Congress expired with no action taken.

D. George Washington Woodward

James Knox Polk was never supposed to become President of the United States. When he declared his candidacy for the election of 1844, most knowledgeable political observers considered him nothing more than a sacrificial lamb. After dominating debates

278 Id.
280 WARREN, supra note 128, at 386 n.2. Nott was not isolated in this sentiment. Even Thurlow Weed, Spencer’s friend-turned-political-rival in New York, confessed that he had doubts about voting against Spencer’s nomination. “Spencer has terrible but just punishment,” Weed wrote. Id. at 386. “But it was hard, killing him. He made a tremendous struggle for confirmation.” Id.
281 See HOWELL & TENNEY, supra note 239, at 142; John Canfield Spencer, supra note 248.
282 See Massey, supra note 231, at 3; Supreme Court Nominations, supra note 17.
283 See Supreme Court Nominations, supra note 17.
284 See Massey, supra note 231, at 3; Supreme Court Nominations, supra note 17. As with the Senate’s rejection of Spencer, the Senate’s decisions to take no actions regarding Tyler’s other nominees were motivated by political considerations rather than by the fitness of the nominees to serve on the Court. See Massey, supra note 231, at 3; Supreme Court Nominations, supra note 17.
286 See EUGENE IRVING MCCORMAC, JAMES K. POLK: A POLITICAL BIOGRAPHY 248, 249–51 (1922); REMINI, supra note 225, at 647.
in Congress for years, Henry Clay had declared his candidacy for the White House, and the smart money was unquestionably on the Whig leader to win easily over his largely unknown opponent.\(^{287}\) Clay and the Whigs even laughed at Polk’s anonymity, hanging large campaign banners bearing the slogan: “Who is James K. Polk?”\(^{288}\)

Yet Polk, the first bona fide “dark horse” candidate in an American presidential election, shocked everyone, capturing a narrow victory over the once-cocky Whigs.\(^{289}\) The fact that Polk publicly pledged to serve only one term, and thus was a “lame duck” chief executive from the outset, only fueled the Whigs’ desires to limit Polk’s impact during the next four years before defeating some new opponent for the presidency.\(^{290}\)

In the context of this ongoing political rancor, Polk faced a stiff political challenge upon entering office because of the death of Justice Henry Baldwin.\(^{291}\) A “political maverick” who frequently departed from the views of his Democratic Party brethren and from the ideas of his fellow Justices, Baldwin espoused a rigid interpretation of the Constitution and rejected the trajectory of expanding powers that the Court had taken since the days of John Marshall.\(^{292}\) Replacing such a jurist carried significant jurisprudential and political importance for the nation, not unlike today’s questions that arose about who would take the seat formerly held by the “originalist” Antonin Scalia after his passing.\(^{293}\) Given that Tyler had already tried unsuccessfully to replace Baldwin’s seat on the Court, only to have the Senate ignore his nominees, one

\[^{287}\text{See REMINI, supra note 225, at 647; see, e.g., MCCORMAC, supra note 286, at 250 ("Clay was conceded a place in the first rank of statesmen, while many, even of Polk’s supporters, did not claim for their candidate more than second-rate ability. . . . Polk was not possessed of spectacular qualities, and he never tried to cultivate them."); SEIGENTHALER, supra note 285, at 91 ("It is likely that the Whigs believed that Clay’s charm, compared to Polk’s prudish personality, gave them an enormous edge. They were campaigning against a humorless, straitlaced little prig from Tennessee. He was, they thought, a fit subject for ridicule.").}\]

\[^{288}\text{See, e.g., SEIGENTHALER, supra note 285, at 92.}\]

\[^{289}\text{See MCCORMAC, supra note 286, at 251 ("Polk was the first ‘dark horse’ ever nominated for President by a political party."); SEIGENTHALER, supra note 285, at 91, 98–99 (noting that Polk’s victory was even more improbable given that he could not even carry the popular vote in his home state of Tennessee).}\]

\[^{290}\text{See MCCORMAC, supra note 286, at 253–54.}\]

\[^{291}\text{See AMERICAN POLITICAL LEADERS, 1789-2009, at 51 (CQ Press ed. 2010).}\]

\[^{292}\text{See THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012, at 95, 96 (3d ed., Clare Cushman ed. 2013).}\]

\[^{293}\text{See id. at 96; Telephone Interview by Michel Martin, NPR Host, Words You’ll Hear, with Nina Totenberg (Feb. 14, 2016), http://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy ("[Antonin Scalia] was [originalism’s] most fierce proponent.").}\]
can only imagine that Polk knew that he was in for a struggle when he nominated George Washington Woodward to do this job.294

Adding to the political intrigue was the death of Justice Joseph Story on September 10, 1845.295 From 1812 until the day that he passed away, Story had proved to be just as outspoken and influential on the Court as Jefferson and Madison had feared.296 During his years on the Marshall Court, only Chief Justice Marshall himself had authored more opinions than Story.297 As the Court shifted and transitioned during Roger Taney’s tenure as Chief Justice, Story became recognized as one of the “old statesmen” on the bench, constantly returning to the theme of preserving a stable Union but also remaining an ardent advocate for preserving private property rights.298 He, too, would be a difficult jurist to replace.299

Polk nominated veteran Democratic Party lawyer, politician, and Cabinet member Levi Woodbury to replace Story on the same day that he nominated Woodward to fill Baldwin’s seat.300 The way that the Senate would react to both of these men would substantially affect the Court’s future.

Nominee’s Political Party: Democratic.301
Nominating President’s Political Party: Democratic.302

294 See generally Massey, supra note 231, at 3 (discussing Tyler’s struggles to fill the vacancies).
296 See, e.g., OXFORD COMPANION, supra note 131, at 984, 985.
299 In the words of at least one scholar: “Joseph Story, as a member of the Marshall Court, was a judicial pillar of almost equal dimension to Chief Justice Marshall.” Robert H. Duesenberg, Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court, 6 VAL. U. L. REV. 233, 233 (1972) (book review). He “remained a force on the Taney Court,” cautioning against what he believed were an overabundance of federal judicial concessions to states’ rights but fiercely guarding the preservation of key personal liberties, particularly the right to property. See OXFORD COMPANION, supra note 131, at 985; see also Calvin Woodward, Joseph Story and American Equity, 45 WASH. & LEE L. REV. 623, 623 (1988) (“Joseph Story was a giant of a man, and assessing the nature and extent of his influence on modern U.S. law is an overwhelming task.”).
301 See OXFORD COMPANION, supra note 131, at 1099.
302 See James K. Polk, WHITE HOUSE, https://www.whitehouse.gov/1600/presidents/
Majority Party in Senate: Democratic.\textsuperscript{303}

Majority Party on the United States Supreme Court: Democratic.\textsuperscript{304} The Court’s composition was identical to its membership at the time of Spencer’s nomination,\textsuperscript{305} with two exceptions: the addition of Samuel Nelson (Democrat) and the death of Joseph Story.\textsuperscript{306}

Predecessor’s Political Party: Democratic.\textsuperscript{307}

President’s Previous Nominations to United States Supreme Court: None.\textsuperscript{308}

Number of Years between Nomination Year and Next Presidential Election Year: Three.\textsuperscript{309}

Nominee’s Prior Legal Record: Like the man whom he was nominated to replace, Woodward was a Pennsylvanian.\textsuperscript{310} He began practicing law in the state’s Wyoming Valley, a region that was rapidly evolving into a hub for mining anthracite coal.\textsuperscript{311} While still in his twenties, members of the area’s bar recognized him as a “bright, articulate, and up-and-coming” attorney “with ‘a large and lucrative practice.’”\textsuperscript{312} Becoming friends with the state’s Governor, Democratic Party member James Porter, helped Woodward obtain a commission as the President Judge of the state’s Fourth Judicial District, a post that Woodward held from 1841 to 1851.\textsuperscript{313}

Nominee’s Prior Political Record: Woodward’s political involvement began at the age of twenty-eight.\textsuperscript{314} Selected to represent his district at the 1837 convention to modernize Pennsylvania’s outdated state constitution, Woodward’s oratorical skills rapidly gained him the reputation of “one of the strongest, if not the strongest man of his party in the convention.”\textsuperscript{315} For better


\textsuperscript{304} See \textit{Compare Supreme Court Justices}, supra note 234 (indicating that all of the members of the Court at the time were democrats).

\textsuperscript{305} See id.

\textsuperscript{306} See id. (indicating that Samuel Nelson had joined the Court and Joseph Story had left).

\textsuperscript{307} See id. (indicating that Henry Baldwin was a Democrat).

\textsuperscript{308} See generally \textit{Supreme Court Nominations}, supra note 17 (indicating no previous nomination by Polk).

\textsuperscript{309} See id. (indicating that the Woodward nomination was on December 23, 1845, which was three years before the 1848 presidential election).

\textsuperscript{310} See \textit{Oxford Companion}, supra note 131, at 1098.

\textsuperscript{311} See Curran, supra note 303, at 166.

\textsuperscript{312} Id.

\textsuperscript{313} See id. at 168.

\textsuperscript{314} See id. at 166.

\textsuperscript{315} See id. at 166, 167.
or for worse, this stature encouraged Democratic Party leaders throughout Pennsylvania to seek Woodward’s favor, quickly dragging him into the political dysfunction that plagued the party throughout the state at that time.316 “[A]crimonious infighting” characterized Democratic politics in Woodward’s home county, with deep divisions forming over the area’s transition from a longtime agricultural economy to a growing industrial center dominated by coal.317 Woodward quickly plunged into this fray, joining and then leaving various statewide alliances and factions on multiple political issues, particularly economic concerns.318 These maneuverings furthered Woodward’s rise as an influential voice in Pennsylvania’s political affairs, but also earned him several enemies.319

Such enemies likely contributed to Woodward’s failure to win a bid for the United States Senate in 1845.320 “[Woodward] gave in caucus a long judiciary opinion why he was the greatest Democrat in creation but he could not make the boys believe it,” proclaimed rival Democrat William S. Ross.321 Ultimately, the Pennsylvania Democrats fell back upon the incumbent senator, a far more “cautious and inoffensive” individual who was a “political lightweight” who had the benefit of offending far fewer people than Woodward.322

When another Pennsylvania Democrat, James Buchanan, resigned from his Senate seat in February 1845, Woodward again sought the national legislative office.323 This time, a significant number of Democrats boycotted the caucus entirely.324 Other Democratic Party members joined a cadre of Whig leaders and voted for Simon Cameron, a wealthy pro-business candidate who favored extreme protectionist measures that he felt would preserve large American enterprises, including those businesses in which he had substantial holdings.325 Shortly after that loss, Polk’s Vice President, George M. Dallas, described Cameron’s political

316 See, e.g., id. at 168, 169, 170, 173.
317 See id. at 168.
318 See, e.g., id. at 168–69, 173.
319 See, e.g., id. at 168, 169, 171, 173.
320 See id. at 173.
321 See id.
322 See id. at 173–74.
323 See id. at 174 (“Only [forty-eight] of the [seventy-three] eligible members participated; and, of this number, a scant [twenty-five] settled on . . . Woodward as their preference.”).
324 See id. at 165, 174.
maneuvering to Polk in great detail. Angered by what he heard, and impressed by Woodward’s “Jeffersonian” inclinations, Polk soon nominated Woodward to the Court.

Controversial Topics On Which Nominee Held Publicized Stance:

Many of Woodward’s most controversial viewpoints began as localized issues in Pennsylvania that eventually spread to the national spotlight. His political adversaries in the state ultimately came back to haunt him when he displayed aspirations at the federal level, including his two already-discussed resounding defeats for the Senate. Politicians like Cameron devoted plenty of energy to depicting Woodward as an individual hostile to protective tariffs and other pro-business measures, claiming that Woodward would champion uninhibited trade and thus damage localized financial interests. Beyond these economic issues, Woodward also spoke in Pennsylvania about his preference for imposing limits upon judicial tenure, a stance that angered many judges who saw such a stance as a threat to their job security.

On certain topics, Woodward’s views demonstrated some surprising southern sympathies. For instance, he objected to the “interference of slavery where it legally existed.” He favored strong localized governments rather than a powerful federal system, pledging his support for “maintaining in their full vigor the reserved rights of the States.” Southern statesmen such as John C. Calhoun would soon put forth similar arguments in justifying the need for their home states to secede from a Union with a centralized

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326 See id. at 175–76.
327 See id. at 179–81. Polk’s initial choice for the Court was a different Pennsylvanian, James Buchanan. See Parry-Giles, supra note 98, at 109. However, when Buchanan rejected this opportunity, Polk ultimately turned to Woodward. See id. Buchanan objected to this decision, advocating ardently for Polk to select Pennsylvania Federalist John M. Read. See id. When Polk declined to follow Buchanan’s advice, Buchanan complained that the President refused to listen to his Cabinet in making this judicial selection. See Curran, supra note 303, at 165 n.3. In response, Polk declared that he “had a perfect right to make [appointments] without consulting [his] Cabinet, unless [he] desired their advice.” See Parry-Giles, supra note 98, at 109.
329 See supra text accompanying notes 320–25.
331 See ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 24–25 (1960); see also Curran, supra note 303, at 167 & n.11 (noting that Woodward said that the first day that he gained bona fide enemies in government was the day that he spoke at Pennsylvania’s constitutional convention in favor of judicial tenure limits).
332 Curran, supra note 303, at 181.
333 Id.
government that, in their view, had grown far too mighty.334

Last, this promoter of “old time Jeffersonian democracy”335 maintained an unyielding stance regarding “foreigners” living in the United States.336 During the Pennsylvania constitutional convention, Woodward had promoted a state constitutional amendment that would “prevent any foreigner who may arrive in the [s]tate after the 4th of July, 1841, from acquiring the right to vote or to hold office in [Pennsylvania].”337 Irish-Americans became a particular target of his animosity.338 He supported the Know-Nothing Party, a political faction that vowed to “purify” American politics by ridding the political system of all immigrants and all non-Protestant religions.339 Although he later softened his views in this area, Woodward would remain linked to this stringent perspective for the rest of his political career, with many commentators even referring to him as “the father of nativism.”340

Public Sentiment Regarding Nominee: Unsurprisingly, a certain degree of public attention focuse d on Woodward’s support of the Know-Nothings and his overall approval of nativist policies.341 The Philadelphia Spirit of the Times, for example, published an article anonymously quoting several foreign-born Democratic members of the Senate who allegedly declared Woodward “unfit” for such a high judicial office.342 Other complaints dealt with the public impressions of Woodward’s background, with one Pennsylvania judge declaring that “it would shock the bar, the bench[,] and the public, to learn that a judge of an inferior court in the woods without any evidence of great legal condition, has been translated to the Supreme Court of the United States.”343

The most prominent public concern, however, centered on Woodward’s opinions regarding protective tariffs.344 Just as he had done in knocking Woodward out of the Senate race, Cameron and

335 Curran, supra note 303, at 180.
336 Id. at 166.
337 Id. at 166–67.
340 Curran, supra note 303, at 167.
341 See, e.g., Parry-Giles, supra note 98, at 109.
343 VIEIRA & GROSS, supra note 339, at 42–43.
344 See Curran, supra note 303, at 187.
his allies stirred up a tremendous public outcry by painting Woodward as an avowed free trade man who would strike down any tariff immediately. When a flood of letters and lobbyists opposing Woodward’s nomination descended upon Washington, Woodward wrote to Polk and asked whether the President wanted to withdraw his nomination. Polk never responded to this letter, opting instead to silently let the proceedings continue.

Woodward did find some allies in the public and the press. In particular, his reputation as a knowledgeable and fair-minded jurist received a vigorous defense from some circles, with proponents praising his “high talents and sterling ability.” Still, as the time for a vote on his nomination drew near, Woodward himself began realizing the hopelessness of his position. Without any powerful patrons in the Senate willing to stand in his corner, Cameron and his followers were able to spread their opposition of Woodward virtually unimpeded.

Ultimately, this was enough to sink Woodward’s nomination. The Democratic-dominated Senate voted 29-20 against him. The entire Whig membership of the Senate opposed him, as did six Democratic Party members, spurred on by Cameron’s public attacks against the nominee. Woodward’s political wars from Pennsylvania had followed him all the way to Washington.

The defeat was a bitter political pill for both Woodward and Polk to swallow. Woodward returned to Pennsylvania, shortly thereafter becoming an Associate Justice and eventually Chief Justice.
Justice of the Pennsylvania Supreme Court. In 1867, he won election to Congress, holding his seat in the House of Representatives until 1871. As for Polk, the President faced far less opposition with his nomination to fill Story’s vacant seat with Woodbury, with the Senate confirming the new Justice just nine days after their rejection of Woodward. The following year, Polk nominated another Pennsylvanian, Robert Grier, to fill Baldwin’s seat. Initially, Polk had voiced concerns about Grier because of Grier’s early alliances with the Federalist Party. Yet Grier possessed far fewer enemies than Woodward and held far fewer controversial viewpoints. Perhaps even more importantly, Grier received Cameron’s approval early in the nomination process. On August 4, 1846, he was confirmed to the Court with ease.

E. Jeremiah Black

Slavery and states’ rights dominated the national debates leading up to the presidential election of 1856. As with the nomination and ultimate rejection of Woodward, and the subsequent nomination and approval of Grier, the Keystone State played a keystone role in these increasingly volatile conversations. This time, Pennsylvanian James Buchanan won the White House, providing the nation with a chief executive possessing an unusual combination of characteristics: alliances in the North but certain distinct sympathies with causes in the South. Buchanan believed that the federal government did not possess power under the Constitution to abolish slavery within the individual states.

555 See OXFORD COMPANION, supra note 131, at 1099.
557 Supreme Court Nominations, supra note 17.
558 See id.; WARREN, supra note 129, at 421.
559 See Curran, supra note 303, at 198; see generally Parry-Giles, supra note 98, at 109 (discussing the reluctance to nominate a Federalist).
560 See Curran, supra note 303, at 198.
561 See id. Furthermore, Buchanan, whom Polk continued to blame for supposed behind-the-scenes machinations leading to Woodward’s rejection, quickly endorsed Grier. Id.
562 Supreme Court Nominations, supra note 17.
563 See generally JEAN H. BAKER, JAMES BUCHANAN 46, 66, 71, 72 (2004) (describing in detail this election and the dominant role that state’s rights—and, in particular, states’ rights regarding slavery—played in the voters’ decisions).
564 See ELBERT B. SMITH, THE PRESIDENCY OF JAMES BUCHANAN 17, 143 (1975). Under a states’ rights philosophy, Buchanan had publicly aligned himself with southern causes as early as the 1830s. Id. at 143. Among his most notable gestures was his opposition to the Wilmot Proviso, which, if enacted, may have banned slavery in the territories. See id. at 17.
565 See BAKER, supra note 363, at 71. In an 1836 speech before the Senate, he declared his viewpoint on this issue in unequivocal terms:
Furthermore, while he opposed the concept of any states seceding from the Union, Buchanan also felt that it was unconstitutional for the federal government to force any state to remain in the United States. Consequently, as seven states seceded from the Union during Buchanan’s tenure in office, the President made no attempts to demand or even persuade the leaders of these states to remain part of the Union.

In 1857, Justice Benjamin Curtis resigned from the Supreme Court in the aftermath of the Court’s decision in Dred Scott v. Sandford, a case preventing the federal government from regulating slavery in federal territories formed after the United States’s creation and holding that any “negro, whose ancestors were . . . sold as [slaves],” could not become an American citizen.
To replace Curtis, Buchanan nominated Nathan Clifford, a lawyer from Maine who had served as Polk’s Attorney General and then later became the nation’s ambassador to Mexico. Clifford’s pro-slavery sympathies and insistence on a rigid dividing line between federal powers and states’ rights made him an extremely controversial candidate. His confirmation margin of 26-23 remains one of the narrowest in history.

On May 31, 1860, Justice Peter Daniel—a southern jurist who, in a concurring opinion in the Dred Scott decision, wrote that “the African negro race never have been acknowledged as belonging to the family of nations”—passed away. Once again, the issues of slavery and states’ rights consumed most of the public and political deliberations regarding who Buchanan would nominate to replace this pro-slavery Justice. On February 5, 1861, fewer than two months after South Carolina’s secession from the Union, Buchanan announced his choice: Jeremiah Sullivan Black.

Predecessor’s Political Party: Democratic.381

President’s Previous Nominations to United States Supreme Court: Nathan Clifford (narrowly confirmed).382

Number of Years between Nomination Year and Next Presidential Election: Buchanan nominated Black two months after Abraham Lincoln won the presidential election of 1860.383 Thus, Buchanan was unquestionably a lame duck President at the time of this nomination.384

Nominee’s Prior Legal Record: Black read the law with Chauncey Forward, one of the leading attorneys in Western Pennsylvania.385 When Forward won election to Congress, Black took over Forward’s law practice for a short time before becoming Deputy Attorney General for Somerset County.386 During this time period, he met Buchanan, a friendship that would help Black for the remainder of his legal and political careers.387

In 1842, Black was appointed President Judge for the Sixteenth Judicial District of Pennsylvania.388 After serving in that capacity for nine years, he was elected to the Pennsylvania Supreme Court.389 He remained in that role until Buchanan called him to Washington.390

Nominee’s Prior Political Record: Within a few days after Buchanan’s inauguration, the new President appointed Black to become the new Attorney General of the United States.391 For the next three years and nine months, Black served with apparent

381 See OXFORD COMPANION, supra note 131, at 248; Supreme Court Nominations, supra note 17.
382 See Supreme Court Nominations, supra note 17.
383 See ABRAHAM, supra note 40, at 114–15.
384 See id. at 115.
386 See Biographies of the Secretaries of State: Jeremiah Sullivan Black (1810-1883), DEP’T ST. OFF. HISTORIAN, https://history.state.gov/departmenthistory/people/black-jeremiah-sullivan (last visited Nov. 17, 2016). It was Forward who first introduced Black to the leading Democratic Party members in Pennsylvania, thereby giving Black his first entry into political circles. See YALE BIOGRAPHICAL DICTIONARY, supra note 377, at 51.
387 See Biographies of the Secretaries of State, supra note 386.
388 See id.
389 See OXFORD COMPANION, supra note 131, at 87.
390 See id. Black was ultimately selected as the Chief Judge of this court, and won re-election to the court in 1854. Id.
distinction in this role. Out of thirty cases that Black argued as Attorney General, he lost only five. Particularly noteworthy were his court victories for the Buchanan Administration involving the legitimacy of Mexican land grants in California.

Near the end of Buchanan’s presidency, Secretary of State Lewis Cass resigned from office. Buchanan then appointed Black to replace Cass as Secretary of State. He had served in this position for fewer than two months when Buchanan then nominated him to the Court. Still, this was enough time for Black to make a vital diplomatic move: requesting that all United States diplomatic representatives warn foreign governments about the perils of formally recognizing the new Confederacy. He also joined with Stanton and Secretary of War Joseph Holt to advocate against secession.

Controversial Topics On Which Nominee Held Publicized Stance:
During his brief tenure as Secretary of State, Black served as Buchanan’s primary advisor during the secession crisis. During this time, he delivered a now-famous opinion to the President, declaring: “[T]he right of the General Government to preserve itself in its whole constitutional vigor by repelling a direct and positive aggression upon its property or its officers[,]” but also stating that the federal government could not compel a state to remain in the Union, as doing so would represent an “offensive war” that had no constitutional basis. Buchanan’s largely unpopular stance on the issue of secession was in large measure due to the legal advice that he received from Black.

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392 See Buchanan, supra note 391, at 35 (reviewing Black’s work as Attorney General).
393 See id.
394 See id.; American Statesmen, supra note 385, at 58; Oxford Companion, supra note 131, at 87.
395 See Baker, supra note 363, at 130. For some time before Cass’s resignation, the Secretary of State had been “inattentive” to key foreign affairs, essentially leaving Buchanan to serve as his own Secretary of State. See id. at 107.
396 See American Statesmen, supra note 385, at 59. Black agreed to this appointment on the condition that Buchanan select Edwin M. Stanton as his new Attorney General, a bargain to which Buchanan reticently agreed. Id.
397 See Biographies of the Secretaries of State, supra note 386; Supreme Court Nominations, supra note 17.
398 See Biographies of the Secretaries of State, supra note 386.
399 See American Statesmen, supra note 385, at 59.
400 See id. at 58–59.
401 American Statesmen, supra note 385, at 58–59; Yale Biographical Dictionary, supra note 377, at 52; Buchanan, supra note 391, at 36.
402 However, Black and Buchanan did not always see eye-to-eye regarding this topic. When Major Robert Anderson requested that Buchanan send military reinforcements to Fort Sumter, Buchanan refused, a decision that provoked Cass’s resignation. See American
Black's most controversial public statements focused directly on the issue of slavery.\(^{403}\) After the Court issued its decision in the *Dred Scott* case, he published a pamphlet that not only supported the Court's holding, but took the most extreme position imaginable in favor of pro-slavery interests.\(^{404}\) Under Black's viewpoint, American territories needed to take "affirmative steps to protect slave holdings."\(^{405}\) Certainly, such a stance was at odds with the majority of northern political and popular viewpoints at the time.\(^{406}\)

Similarly, Black shocked many of his fellow northerners with his answer to the question about whether Kansas should enter the Union as a slaveholding state or a free state.\(^{407}\) Leveraging a states' rights argument, Black stated that Kansas should enter the Union as a slave state under the pro-slavery Lecompton Constitution.\(^{408}\) If the vast and vocal anti-slavery movement within Kansas wished to prevail, Black stated that proponents of this cause would need to wait until Kansas achieved statehood before they could vote to abolish slavery within their borders.\(^{409}\) Buchanan adopted this stance as well.\(^{410}\)

Public Sentiment Regarding Nominee: Most of the attention regarding Black's fitness to serve on the Court focused on the nominee's positions about slavery.\(^{411}\) Predictably, southerners tended to favor Black's confirmation because of this paramount issue, while northerners tended to advocate for Black's rejection.\(^{412}\)
His close ties to Buchanan certainly did not help him in the North, either, as Buchanan had worn out his welcome with many northerners by this time.\textsuperscript{413}

Yet certain media outlets and political leaders publicly focused on another issue: the question of whether it made any sense for a lame duck President to nominate a Supreme Court Justice with the inauguration of the new President-elect just weeks away.\textsuperscript{414} Based on this rationale, widely respected northern newspaper editor Horace Greeley called Buchanan’s move “a flight of insolence” and proclaimed that he would oppose any nomination from the soon-to-be-departed President even if the nominee “possessed all the virtues of Marshall and Story together.”\textsuperscript{415} Other Republican newspapers joined Greeley in this call to turn down Black and allow the new incoming President to select a nominee of his own.\textsuperscript{416}

As with Clifford’s nomination, the vote was close.\textsuperscript{417} This time, however, the vote did not turn out in favor of Buchanan’s nominee.\textsuperscript{418} The Senate rejected Black by a vote of 26-25.\textsuperscript{419} The key difference between Clifford’s victory and Black’s defeat was surprisingly simple: by the time the Senate considered Black’s nomination, some Democratic Party senators from southern states had resigned to join the Confederacy.\textsuperscript{420} If these senators were still in office, all of them likely would have voted for Black, ensuring his confirmation.\textsuperscript{421} Furthermore, many northern Democrats, upset that Black had openly opposed Douglas in the 1860 presidential election, refused to vote in Black’s favor.\textsuperscript{422} As for the Republican members of the Senate, finding an easy way to reserve this Supreme Court nomination for the incoming President from their party was an obvious choice.\textsuperscript{423}

\textsuperscript{413} See, e.g., BAKER, supra note 363, at 104, 106, 107, 112.
\textsuperscript{414} See ABRAHAM, supra note 40, at 114–15.
\textsuperscript{415} Frank, supra note 369, at 178 n.18; see Swindler, supra note 39, at 539.
\textsuperscript{416} See, e.g., ABRAHAM, supra note 40, at 114–15.
\textsuperscript{417} See Supreme Court Nominations, supra note 17.
\textsuperscript{418} See OXFORD COMPANION, supra note 131, at 88.
\textsuperscript{419} See Frank, supra note 369, at 178.
\textsuperscript{420} See ABRAHAM, supra note 40, at 114–15.
\textsuperscript{421} See YALE BIOGRAPHICAL DICTIONARY, supra note 377, at 52 (attributing the defeat of Black’s nomination primarily to the absence of these southern senators).
\textsuperscript{422} See, e.g., ABRAHAM, supra note 40, at 114; see also Jeffrey K. Tulis, The Appointment Power: Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court, 47 CASE. W. RES. L. REV. 1331, 1350–51 (1997) (describing the peculiarity of the coalition that formed to block Black’s nomination: Northern Republicans and Douglas Democrats).
\textsuperscript{423} See ABRAHAM, supra note 40, at 114–15; Frank, supra note 369, at 178.
Years in public service had left Black virtually penniless. He returned to York, Pennsylvania, and rebuilt his career as a country lawyer, working without an office or any clerical help. In the end, he formed a tremendous reputation arguing before the very Court to which he could not receive confirmation, appearing in such cases as the famous Reconstruction matter of *Ex parte McCardle*; the legendary patent law case of *Rubber Co. v. Goodyear*; and the leading Fourteenth Amendment *Slaughter-House Cases*. The Court’s opinion in the last of these cases came from the pen of Justice Samuel Freeman Miller—the man whom Abraham Lincoln successfully nominated for the Supreme Court seat that Black had once hoped to fill.

**F. Ebenezer Hoar**

The turmoil of the Civil War did not immediately end when Robert E. Lee surrendered to Ulysses S. Grant at the Appomattox Courthouse. In many ways, the worst was yet to come. The Union was reunited in name only. The federal government now needed to do what the military could not accomplish: determine how to politically handle these states that had separated from and taken up arms against the nation of which they were now once again a part. The years of making these unprecedented determinations, a period known as “Reconstruction,” became a kind of cold war throughout the country, with northerners now also fighting other northerners and southerners now also feuding with southerners about what should be done.

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424 See Buchanan, supra note 392, at 36.
425 See id. at 36, 37.
426 *Ex parte McCardle*, 74 U.S. 506 (1869); see Buchanan, supra note 392, at 36.
427 *Rubber Co. v. Goodyear*, 76 U.S. 788 (1869); see Buchanan, supra note 392, at 36.
428 *Slaughter-House Cases*, 83 U.S. 36 (1873); see Buchanan, supra note 392, at 36–37.
429 See *Slaughter-House Cases*, 83 U.S. at 57; *Supreme Court Nominations*, supra note 17.
430 See, e.g., *Reconstruction: People and Perspectives* 51 (James M. Campbell et al. eds., 2008). One leading early twentieth century historian, Walter L. Fleming, even referred to the turmoil immediately after the Civil War as “The Sequel of Appomattox.” Walter Lynwood Fleming, *The Sequel of Appomattox: A Chronicle of the Reunion of the States* 1 (1919). This tumultuous environment extended to the United States Supreme Court, which was forced to grapple with multiple unprecedented constitutional issues, including the enactment of three powerful new constitutional amendments, during the Reconstruction Era. See *Oxford Companion*, supra note 131, at 827–28 (describing cases and struggles that the Supreme Court faced during the Reconstruction Era).
432 See id. at 17–18.
433 See id. at 17–18, 33–34.
Against this backdrop, Andrew Johnson rose to the presidency after Lincoln’s assassination, presiding over a country that now seemed more divided than ever before.\footnote{See Heather Cox Richardson, \textit{West From Appomattox: The Reconstruction of America After the Civil War} 38 (2007) (describing Grant’s accurate observation that Reconstruction had been set back an untold number of years because of Lincoln’s assassination); Andrew Johnson, \textit{White House}, https://www.whitehouse.gov/1600/presidents/andrewjohnson (last visited Dec. 5, 2016).} Presenting with the herculean task of trying to reconcile these warring factions, he became unpopular enough that members of Congress launched an impeachment attempt against him that nearly succeeded.\footnote{See Richardson, supra note 434, at 41–42; see also \textit{The Impeachment of Andrew Johnson (1868): President of the United States}, U.S. Senate, http://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm (last visited Dec. 5, 2016).} The Republican Party had split into two groups over the issues surrounding Reconstruction, and neither approved of Johnson’s policies.\footnote{See Richardson, supra note 434, at 50–51.} The “Radical Republicans” demanded harsh justice for former Confederate leaders and full citizenship and suffrage rights for African-Americans.\footnote{See \textit{id.}; see also Fonner, supra note 430, at 24 (describing the broad nationalism and strong federal advocacy embraced by Radical Republicans).} More “moderate” Republicans were less concerned about African-Americans gaining the right to vote, but they did seek citizenship for African-American freedmen and sought to prevent former Confederate leaders from holding political offices.\footnote{See Paul E. Teed & Melissa Ladd Teed, \textit{Reconstruction: A Reference Guide} 4 (2015).} Johnson failed to fully meet any of these demands, vetoing the Civil Rights Act of 1866 on states’ rights grounds and allowing ex-Confederates to attain political positions in hopes of establishing a swift reconciliation between the North and the South.\footnote{See Glenn R. Schroeder-Lein & Richard Zuczek, \textit{Andrew Johnson: A Biographical Companion} 33 (2001); Hans L. Trepousse, \textit{Andrew Johnson: A Biography} 245, 246 (1989); Teed & Teed, supra note 438, at 40, 41–42.}

When Grant, the Civil War hero of the North, won the presidential election in 1868, he arrived in office to find that relations between the North and South had not improved, and had in many ways deteriorated, during Johnson’s time in office.\footnote{See, e.g., Richardson, supra note 434, at 91–93.} To avoid conflicts among the various political interests in the legislature, Grant refused to consult with the Senate about his Cabinet positions, making his selections in secret and then submitting a list to the Senate for confirmation.\footnote{See Jean Edward Smith, \textit{Grant} 465, 468 (2001).} Many of these Cabinet appointees were Grant’s personal friends, picked for their
positions primarily because of Grant’s famous loyalty toward his longtime companions.\footnote{See, e.g., id. at 468–70.}

While the Senate approved Grant’s Cabinet appointments, some of these selections angered veteran Republican politicians who believed that their senior status merited one of these influential positions.\footnote{See id. at 469–70.} To make matters worse, a number of Grant’s Cabinet members repaid their friend’s confidence poorly.\footnote{See, e.g., id. at 552, 553–54, 586.} Despite Grant’s steadfast personal honesty, scandals hammered his Administration, from his Secretary of War’s acceptance of bribes in exchange for granting merchants exclusive trading rights at American military bases to his Chief-of-Staff’s leadership in an extensive tax fraud scheme.\footnote{See 1 MARY ELLEN SNODGRASS, THE CIVIL WAR ERA AND RECONSTRUCTION: AN ENCYCLOPEDIA OF SOCIAL, POLITICAL, CULTURAL, AND ECONOMIC HISTORY 286–87 (2011); Freeman Stevenson, Top Scandals and Controversies of Each United States President, Deseret News (May 20, 2013), http://www.deseretnews.com/top/1512/18/Ulysses-S-Grant-Top-scandals-and-controversies-of-each-United-States-president.html.}

Yet there was one member of Grant’s Cabinet who neither provoked widespread controversies nor perpetrated scandals: Ebenezer Rockwood Hoar, the President’s choice for Attorney General.\footnote{See SMITH, supra note 441, at 469 (describing Hoar’s merits and noting that Hoar was one of Grant’s most respected Cabinet appointments).} Thus, when the membership of the Supreme Court expanded to nine Justices in 1869, Grant’s decision to nominate Hoar for this newly created seat seemed like a safe choice.\footnote{See id. at 506 (“On December 14, 1869, he sent the name of [Hoar] forward, confident his attorney general would be confirmed.”); see also Swindler, supra note 49, at 539 (discussing the expansion of the Court to nine Justices).} Republicans dominated the Senate by a count of 62-12,\footnote{See BETH & PALMER, supra note 448, at 9; Swindler, supra note 49, at 539–40.} 448 and Hoar had not engaged in the practices of graft and corruption that had tainted so many other individuals within Grant’s Administration.\footnote{See id.; Swindler, supra note 49, at 539–40.} On paper, the odds seemed in favor of Hoar obtaining confirmation from the Senate without any problems.\footnote{See BETH & PALMER, supra note 448, at 9; Hoar, Ebenezer Rockwood, (1816-1895), BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000653 (last visited Nov. 16, 2016).}

Nominee’s Political Party: Republican.\footnote{See BETH & PALMER, supra note 448, at 9; Ulysses S. Grant (1822-1885), MILLER CTR., http://millercenter.org/president/grant (last visited Nov. 16, 2016).} Nominating President’s Political Party: Republican.\footnote{See BETH & PALMER, supra note 448, at 9; Swindler, supra note 49, at 539–40.
Majority Party in Senate: Republican.\(^{453}\)

Majority Political Party on United States Supreme Court: Democratic.\(^{454}\) Chief Justice Salmon Chase, a former Republican, had switched his allegiance to the Democrats in 1868.\(^{455}\) Stephen Field, Nathan Clifford, Samuel Nelson, and Robert Grier—who by this point was in poor health and about to retire—comprised the rest of the Court’s Democratic wing.\(^{456}\) Republicans on this Court were David Davis and Noah Swayne.\(^{457}\)

Predecessor’s Political Party: Not applicable.\(^{458}\)

Number of Years between Nomination Year and Next Presidential Election: Slightly fewer than three years.\(^{459}\)

Nominee’s Prior Legal Record: Born into a wealthy New England Puritan family, Hoar spent a few years teaching in Pennsylvania before returning to New England and studying law at Harvard.\(^{460}\) In 1849, he became a judge on the Court of Common Pleas in Massachusetts, a position that he maintained until deciding to re-enter the private practice of law six years later.\(^{461}\) While serving in this role, he gained particular attention for his opinions regarding the federal Fugitive Slave Act, a statute that he refused to charge juries to ignore despite his adamant beliefs that this law was

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\(^{453}\) See BETH & PALMER, supra note 448, at 9.

\(^{454}\) See Compare Supreme Court Justices, supra note 234 (noting that the Justices were: Chief Justice Salmon Portland Chase, 1864-1873, Republican; Justice Stephen Johnson Field, 1863-1897, Democrat; Justice Samuel Nelson, 1845-1872, Democrat; Justice Robert Cooper Grier, 1846-1870, Democrat; Justice Nathan Clifford, 1857-1881, Democrat; Justice Noah Haynes Swayne, 1862-1881, Republican; Justice Samuel Freeman Miller, 1862-1890, Republican; Justice David Davis, 1862-1877, Republican); Salmon P. Chase, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Salmon-P-Chase (last visited Nov. 27, 2016) (“[I]n 1868, during [Salmon Chase’s] chief justiceship, he sought the Democratic nomination [for President of the United States] as an opponent of the Radical Republicans’ program of reconstructing the defeated southern states.”).

\(^{455}\) See Salmon P. Chase, supra note 454.

\(^{456}\) See Compare Supreme Court Justices, supra note 234.

\(^{457}\) See id.

\(^{458}\) See The Supreme Court of the United States and the Federal Judiciary, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/courts_supreme.html (last visited Nov. 28, 2016) (“The number of sitting [J]ustices fell to eight before an act of 1869 provided for nine Justices, one for each of the judicial circuits established in 1866.”).


\(^{461}\) See OXFORD COMPANION, supra note 131, at 465.
unconstitutional. 462 “It has been said sometimes, and in some places, that there are laws which it is the duty of citizens to disobey or resist,” he declared to one assembled jury after admitting his personal distaste for this law. 463 “But, gentlemen, it is not a question of private conscience, which determines our duties in the premises. A man whose private conscience leads him to disobey a law recognized by the community must take the consequences of that disobedience.” 464

In 1859, Hoar became an associate justice of the Massachusetts Supreme Court. 465 For the next decade, he carved out a reputation as an unremarkable but consistently high-quality member of that bench. 466 Frederic Greenhalge, the Governor of Massachusetts during Hoar’s time on the bench, summed up Hoar’s judicial contributions by stating: “His judgments were independent; they had about them virility, freshness and power. There was not a drop of sluggish blood in his veins . . . . He respected precedent, but he did not permit precedent to play the part of tyrant.” 467

Nominee’s Prior Political Record: Before he ever heard a case on a Massachusetts court’s bench, Hoar became a noted public figure throughout the state due to his fervent opposition to slavery. 468 A member of the Whig Party, he repeatedly designated himself as a “Conscience Whig,” thus clearly distinguishing himself from the pro-slavery “Cotton Whigs” who were widespread in the southern states. 469 In 1846, he was elected to the Massachusetts State Senate, where he became one of the state legislature’s leading voices regarding the anti-slavery movement. 470 Even after leaving this political office, he remained a staunch advocate for this cause, helping form the anti-slavery Free Soil Party and then the Republican Party in Massachusetts after the Whigs dissolved. 471

462 See Storey & Emerson, supra note 460, at 83–84.
463 Id. at 85.
464 Id.
467 Id. at 124.
468 See id. at 43–44.
471 See, e.g., Storey & Emerson, supra note 460, at 39–40, 43–45.
Prior to asking Hoar to become his Attorney General, Grant’s meetings with the judge from Massachusetts were few and far between.\(^{472}\) The appointment occurred through a rather circuitous route. After taking office, Grant offered the position of Secretary of the Interior to George S. Boutwell, the former Governor of Massachusetts.\(^{473}\) Boutwell declined the appointment, but recommended that Grant select an Attorney General from Boutwell’s home state.\(^{474}\) “[A]nother eminent Massachusetts man who was not in Congress” suggested a jurist in whom Grant had no interest, and then mentioned Hoar’s name.\(^{475}\) Apparently remembering a pleasant dinner party conversation with Hoar, Grant agreed to consider him.\(^{476}\) Evidently, he found Hoar’s credentials satisfactory, as the President quickly added Hoar to his list of Cabinet appointees.\(^{477}\)

As Grant had never held any political office prior to the presidency, Hoar soon became one of the President’s key political advisors as well as his chief legal advisor.\(^{478}\) Almost immediately, Hoar’s abilities in both realms received a substantial test. Alexander T. Stewart, Grant’s pick for Secretary of the Treasury, owned one of the nation’s most prosperous retail businesses.\(^{479}\) A law enacted in 1789 forbade anyone “concerned or interested in carrying on the business of trade or commerce” from leading the Treasury Department.\(^{480}\) When members of the Senate objected to Stewart’s appointment, Grant asked Hoar to provide his opinion on the issue.\(^{481}\) Stewart proposed a compromise: he would renounce his title to any private commercial interests for the duration of his tenure as Secretary of the Treasury.\(^{482}\) Hoar, however, stated that

\(^{472}\) See id. at 163.
\(^{473}\) See id.
\(^{474}\) See id.
\(^{475}\) See id.
\(^{476}\) See id.
\(^{477}\) See id.
\(^{479}\) See SMITH, supra note 441, at 468.
\(^{480}\) Id. at 470.
\(^{481}\) See id. 469 (“As the principal legal advisor to the [P]resident, [Grant would have consulted with Hoar].”). The Senate’s objection on statutory grounds arose likely because of the “feelings ruffled” of the senators who disagreed with Grant’s independence and secrecy in selecting his Cabinet, and not because the objecting senators were concerned about the proper application of this old law. See id. at 470. Chief among the senators raising this issue was New Yorker Roscoe Conkling, whom Chester Arthur would later nominate to the Court. See id.; Supreme Court Nominations, supra note 17.
\(^{482}\) See STOREY & EMERSON, supra note 460, at 166.
such a move was impractical, as the taint of a conflict of interest based on Stewart’s prior private commercial dealings still remained.483 Based on Hoar’s stance on this issue, Stewart stepped down from this post within a few days.484

Controversial Topics On Which Nominee Held Publicized Stance: Without a doubt, Hoar’s anti-slavery stance was controversial, particularly when viewed on a national scale.485 His decades-old legacy as an anti-slavery reformer, however, apparently did not cause any significant objections to his nomination to the Supreme Court.486

More controversial than slavery were Hoar’s positions regarding Andrew Johnson.487 Hoar had publicly defended Johnson during his impeachment proceedings, stating that the President had not engaged in the level of “high [c]rimes and [m]isdemeanors” that warranted removal from office.488 Johnson’s many enemies, particularly the Radical Republicans who remained in Congress, neither forgot nor forgave Hoar’s views on this issue.489

Hoar’s most notable disputes, however, arose from his commitment to obstructing widespread political patronage, particularly in the judicial system.490 A man known for “clinging to virtue as though it was a peculiar possession,”491 Hoar found the horse trading of political favors extraordinarily distasteful.492 When Congress passed a law in 1869 that established several new Circuit Court judgeships and assigned the President the responsibility of filling these positions, Hoar saw this opportunity as a personal

483 See id.
484 See id.
485 See, e.g., id. at 39–40, 43–45, 110–14, 117 (providing a thorough review of Hoar’s outspoken and uncompromising stance on slavery).
486 See id. at 197–98. None of the sources consulted for this article mentioned anything about Hoar’s anti-slavery positions causing any problems in the political or public debates about whether to confirm him to the Court. See, e.g., Ebenezer Rockwood Hoar, supra note 459.
489 See ABRAHAM, supra note 40, at 126; HOGUE, supra note 487, at 8.
490 Shugerman, supra note 478, at 158 (“[Hoar] was famous for fighting relentlessly against patronage appointments and unqualified judicial nominees.”); see BETH & PALMER, supra note 448, at 9; HOGUE, supra note 487, at 8; Swindler, supra note 39, at 539–40.
491 Frank, supra note 369, at 183 n.35.
492 See, e.g., BETH & PALMER, supra note 448, at 9; HOGUE, supra note 487, at 8; Frank, supra note 369, at 183 n.35; Shugerman, supra note 478, at 158; Swindler, supra note 39, at 539–40.
crusade to prove the triumph of the merit system in the federal government.\textsuperscript{493}

Grant asked Hoar to provide him with recommended nominees for each of these new judicial seats.\textsuperscript{494} Hoar fulfilled this obligation without asking any of the senators from either party about political debts that needed to be discharged, a practice that first surprised and then angered the legislators.\textsuperscript{495} “Nearly every senator had a candidate of his own for the Circuit Court,” wrote two of Hoar’s biographers, “but in almost every instance the President took the Attorney-General’s advice.”\textsuperscript{496}

Without a doubt, Hoar’s recommendations irritated many members of the Senate.\textsuperscript{497} Some accounts, however, point out that the righteous manner in which Hoar conducted this merit-based process contributed to his sudden unpopularity in Washington.\textsuperscript{498} “He had the plain speech and trying sincerity of latitude [forty-two degrees north] . . . in an extreme degree,” note Hoar’s biographers, “and it proved hard to bear at Washington.”\textsuperscript{499} Charles Francis Adams, a distant relative who knew Hoar well, took his description of the nominee’s challenges in dealing with Washington politicians a step further:

A slight difference in his composition—in the balance, so to speak, of his make-up—would have wholly changed the result, bringing to the front the more repellant as well as familiar attributes of those of whom he was a type. A man of intense, deep-rooted convictions—religious, political, social; of strong family and local, almost clan, feelings; seeing things most clearly from his own point of view, and not devoid of prejudices, . . . Judge Hoar was saved from that

\textsuperscript{493} See BETH & PALMER, supra note 448, at 9.

\textsuperscript{494} See id.

\textsuperscript{495} See id.; Frank, supra note 369, at 184.

\textsuperscript{496} STOREY & EMERSON, supra note 460, at 182.

\textsuperscript{497} See, e.g., ABRAHAM, supra note 40, at 126; HOGUE, supra note 487, at 8 (“[While serving as Attorney General], Hoar had alienated [s]enators by recommending to Grant nominees for circuit judge without regard for the [s]enators’ preferences.”); OXFORD COMPANION, supra note 131, at 465–66 (“His high professional standards, refusal to play party politics, and advocacy of a civil service system lost for the nation a Justice of uncompromising integrity.”); Shugerman, supra note 478, at 158 (“Attorney General Hoar carefully vetted all judicial nominations with high standards, and he rejected many of the senators’ preferred candidates. His contemporaries remarked that he . . . was an ‘unforgiving foe of sham, trickery, and injustice,’ that he was ‘absolutely uncompromising’ with his enemies, and that he had opposed patronage with an ‘unaccommodating . . . temperament.’”).

\textsuperscript{498} See BETH & PALMER, supra note 448, at 9; Frank, supra note 369, at 184 (“[H]is manner was brusque and in advising Grant . . . he had been less than cooperative with the Senate spoilsmen.”).

\textsuperscript{499} STOREY & EMERSON, supra note 460, at 182.
Puritan sourness of disposition so often noticed, by a sense of humor and a spirit of kindliness. . . .

Public Sentiment Regarding Nominee: Grant’s nomination of Hoar received widespread approval from the press. In Hoar, they saw a man whose honesty and apparent commitment to merit-based governance illustrated the qualities that they wanted in a Supreme Court Justice.

Several politicians, however, expressed far different opinions. The Radical Republicans in the Senate formed a coalition against Hoar, making “no effort to conceal the fact that they found Hoar objectionable because he had favored a stronger civil service system.” Hoar’s support of Johnson during the impeachment proceedings also publicly resurfaced as a keystone of Radical Republican opposition toward his candidacy. Certain legislators added a new ingredient to the equation, questioning whether the new Justice should come from a “reconstructed” southern state rather than from New England.

Yet perhaps no one described the situation better than Simon Cameron, the Pennsylvania senator who several years earlier played such a critical role in destroying Woodward’s appointment chances. Cameron asked rhetorically when questioned about Hoar’s nomination: “What could you expect for a man who had snubbed seventy [s]enators?” Cameron’s prediction was correct. The Senate rejected Hoar by a vote of 33-24, led primarily by the Radical Republicans. Shortly thereafter, Grant offered to renominate Hoar to the Court, but Hoar refused, instead recommending William Strong and Joseph Bradley as possible nominees. Ultimately, Bradley was overwhelmingly confirmed to fill the new seat on the Court. In 1870, Hoar resigned from the Cabinet at Grant’s request, opening the door for Hoar to return to Pennsylvania and win election to the House of Representatives.

500 Frank, supra note 369, at 183–84 n.35.
501 See Hogue, supra note 487, at 8; Smith, supra note 441, at 469, 506.
502 See Hogue, supra note 487, at 8; Smith, supra note 441, at 469, 506.
503 Swindler, supra note 39, at 539–40.
504 See McGill, supra note 488, at 227; Swindler, supra note 39, at 540.
505 See Swindler, supra note 39, at 540.
506 See supra notes 345, 349–52 and accompanying text.
507 Frank, supra note 369, at 183 n.35.
508 See Oxford Companion, supra note 131, at 465; Swindler, supra note 39, at 539–40.
510 See Supreme Court Nominations, supra note 17. Strong, too, was ultimately confirmed to the Court, selected by Grant to replace Robert Grier. See id.
three years later.511

G. William Hornblower

In 1884, Grover Cleveland became the first Democratic Party member since the Civil War to be elected to the White House.512 After serving for four years, he lost the 1888 election to Benjamin Harrison, and then ran again for the presidency successfully in 1892.513 Within a few months after Cleveland’s second inauguration, Justice Samuel Blatchford passed away.514 Now, the President from New York faced the chance and the challenge of replacing the New York-born Blatchford—who, coincidentally enough, had been appointed by another President from New York, Chester Alan Arthur, to replace prominent New York jurist Ward Hunt on the Court.515 From the outset, Cleveland faced pressures to appoint somebody from his home state to fill what had become known as the “New York seat” on the Court.516 Cleveland also had the enviable opportunity to shift the Court’s political power balance by replacing Blatchford, a Republican, with someone from Cleveland’s own party.517

During both of his presidential terms, preserving American business interests played a paramount role in Cleveland’s policy interests.518 His multiple efforts to tighten the nation’s fiscal belt included attempting to impose federal regulations on the nation’s railroads; refusing to use federal funds to purchase seed grain for Texas farmers plagued by severe droughts; maintaining the Treasury’s gold reserve; repeatedly vetoing pensions for Civil War veterans whose disabilities were not connected to military service; and deploying the United States military to break up a railroad

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511 See H. W. BRANDS, THE MAN WHO SAVED THE UNION: ULYSSES GRANT IN WAR AND PEACE 459 (2013) (“[Grant] removed Ebenezer Hoar from the cabinet to placate senators the attorney general had crossed.”); OXFORD COMPANION, supra note 131, at 466.
513 See GRAFF, supra note 512, at 94–95, 109; Presidential Elections, 1789-2016, supra note 512.
514 See OXFORD COMPANION, supra note 131, at 91.
515 See ALYN BRODSKY, GROVER CLEVELAND: A STUDY IN CHARACTER 26 (2000); HALL, supra note 297, at 191; OXFORD COMPANION, supra note 131, at 91–92; Supreme Court Nominations, supra note 17.
516 HALL, supra note 297, at 191.
517 See infra notes 529–30 and accompanying text.
518 See, e.g., GRAFF, supra note 512, at 112 (“On [Inauguration Day], Cleveland was the honored guest of one hundred New York businessmen who had journeyed to the city on the overnight train to be his escort at the festivities. It was not lost on anyone that this spectacle would be a fitting symbol for the new administration.”).
strike in Chicago.\footnote{See Brodsky, supra note 515, at 181, 199, 341–42, 359; Robert Higgs, Why Grover Cleveland Vetoed the Texas Seed Bill, INDEP. INST. (July 1, 2003), http://www.independent.org/publications/article.asp?id=1329. Cleveland’s reputation as a fiscally conservative executive leader began long before he reached the White House. During his years as the Mayor of the City of Buffalo, Cleveland shocked members of the city council by vetoing multiple small grants to civic organizations and striking down a street cleaning contract on the basis that these measures were all financially irresponsible. See Bill White, America’s Fiscal Constitution: Its Triumph and Collapse 123 (2014). Similarly, as Governor of New York State, Cleveland vetoed a bill that would have lowered city transit fares in New York City because, in his view, such legislation constituted unlawful government interference with municipal contracts. See id. at 124.} This record, coupled with the fact that the United States faced a severe economic depression at the time when Cleveland returned to the White House in 1892, strongly indicates that Cleveland sought a “pro-business” jurist to replace Blatchford on the nation’s highest Court.\footnote{See White, supra note 519, at 131–33.}

On September 19, 1893, Cleveland announced his nomination of William Butler Hornblower to become the newest Justice on the Court’s bench.\footnote{See Supreme Court Nominations, supra note 17.} Initially, Cleveland’s choice was well-received.\footnote{See Carl A. Pierce, A Vacancy on the Supreme Court: The Politics of Judicial Appointment 1893-94, 39 TENN. L. REV. 555, 563 (1972) (“The initial response to the announcement of Hornblower’s nomination must have pleased the President. The New York City bar united in support of the nominee; reporters who interviewed prominent New Yorkers heard only words of praise for the young lawyer.”); see also Geyh, supra note 150, at 196 (noting that one publication even went so far as declaring that it could not find a single flaw in Hornblower as a prospective Supreme Court Justice).} Hornblower was a New Yorker, a Democrat, and a respected lawyer who had represented big business interests successfully for several years.\footnote{See Pierce, supra note 522, at 564–65.} The Senate, however, ignored Cleveland’s nomination of Hornblower completely.\footnote{See Graff, supra note 512, at 110.} Unbowed, Cleveland, still expecting a routine confirmation, renewed Hornblower’s nomination on December 5, 1893.\footnote{See Compare Supreme Court Justices, supra note 234.}

Nominee’s Political Party: Democratic.\footnote{See Brodsky, supra note 515, at 515, at 326; Oxford Companion, supra note 131, at 475.}
Nominating President’s Political Party: Democratic.\footnote{See Pierce, supra note 522, at 560.}
Majority Party in Senate: Democratic.\footnote{See id.}
Majority Political Party on United States Supreme Court: Republicans held a slim majority, with Justices David Brewer, Henry Brown, Horace Gray, John Marshall Harlan, and George Shiras, Jr.\footnote{See Compare Supreme Court Justices, supra note 234.} Democrats on this Court were Chief Justice Melville
Fuller, and Justices Howell Jackson and Stephen Field.\textsuperscript{530}

Predecessor’s Political Party: Republican.\textsuperscript{531}

President’s Previous Nominations to United States Supreme Court: None during this term in office. Cleveland had successfully nominated two Justices to the Court, Melville Fuller and Lucius Lamar, during his earlier term in the White House before losing to Harrison in 1888.\textsuperscript{532}

Number of Years between Nomination Year and Next Presidential Election: Nearly three years.\textsuperscript{533}

Nominee’s Prior Legal Record: Hornblower was born into a family whose deep roots in law and politics extended all the way back to the Revolutionary War.\textsuperscript{534} From an early age, he showed an interest in continuing the family’s traditions, graduating with a law degree from Columbia in 1875.\textsuperscript{535} After working for thirteen years as a bankruptcy attorney with the firm of Carter & Eaton in New York, Hornblower and two of his friends decided to develop their own practice.\textsuperscript{536} The law office of Hornblower, Byrne & Taylor rapidly became one of New York’s most influential business law firms, with a client list that included the New York Central Railroad Company, the New York Life Insurance Company, the Otis Elevator Company, and the New York Security and Trust Company.\textsuperscript{537}

At the time of his nomination to the Court, Hornblower had never served in a judicial position of any kind, with the exception of some intermittent work as a court-appointed referee in corporate, railroad, and insurance matters.\textsuperscript{538} Nevertheless, the forty-two-year-old New Yorker had distinguished himself in the legal realm to which Cleveland attached the greatest importance.\textsuperscript{539} For the President, that appeared to be justification enough.

Nominee’s Prior Political Record: Hornblower was a lifelong

\textsuperscript{530} See id.
\textsuperscript{531} See id. Notably, however, Blatchford was a “swing voter” on the Court, an unpredictable centrist similar to the place that Kennedy holds on the Court today. See Oxford Companion, \textit{supra} note 131, at 91, 92.
\textsuperscript{534} See Milo T. Bogard, The Redemption of New York 381–82 (1902).
\textsuperscript{535} See id. at 382.
\textsuperscript{536} See id.
\textsuperscript{537} See Pierce, \textit{supra} note 522, at 559–60.
\textsuperscript{538} See id. at 560.
\textsuperscript{539} See id. at 559, 560.
Democrat. When the party divided on questions involving commercial enterprises, he consistently sided with Cleveland’s positions. Overall, though, Hornblower’s actual involvement with political affairs was minimal, even though he knew and associated with many Democratic Party leaders in New York. Prior to receiving the nomination from Cleveland, Hornblower’s deepest forays into political matters came in 1890, the year that he joined a commission to propose amendments to New York State’s constitution, and 1891, the year that he joined a New York City Bar Association committee that investigated election frauds allegedly perpetrated by Deputy Attorney General Isaac P. Maynard.

Controversial Topics On Which Nominee Held Publicized Stance:
For the most part, Hornblower was an uncontroversial and uncomplicated individual. After his nomination, however, one recent contentious act reared its head again: his work on the City Bar’s committee that had found Maynard responsible for election fraud. Two years after the committee rendered this finding, Maynard sought a seat on the New York State Court of Appeals. When his political rivals raised the committee’s findings as evidence that Maynard was unethical and unfit to serve on the Court of Appeals, Maynard was defeated.

One of Maynard’s closest friends was Senator David B. Hill. When Hill learned that Cleveland had nominated a member of the City Bar’s committee that had damaged Maynard’s career, he was livid. Despite the fact that they belonged to the same party, Hill already disliked Cleveland because of the President’s refusal to uniformly support Democratic positions in Washington. Now, this nomination gave him the chance to avenge a perceived slight to a friend and publicly embarrass the President at the same time.

At first, Hill attempted to only delay the nomination, hoping that

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540 See BOGARD, supra note 534, at 382; Pierce, supra note 522, at 560.
541 See BOGARD, supra note 534, at 382.
542 See Pierce, supra note 522, at 560 (“Although a Democrat since 1872, [Hornblower] generally limited his public activity to matters concerning the legal profession.”).
543 See id.
544 See supra notes 536–43 and accompanying text.
545 See Pierce, supra note 522, at 560.
546 See id. at 564.
547 See GEYH, supra note 150, at 196; Pierce, supra note 522, at 564.
548 See The Black Appointment, PITTSBURGH PRESS, Aug. 19, 1937 (describing Maynard as Hill’s protégé).
549 See id.
550 See Pierce, supra note 522, at 563, 564.
551 See id. (“[Hill’s] defense of Maynard would necessitate an attack on Hornblower; his attack on Hornblower would be an attack on Cleveland.”).
Cleveland would become frustrated and nominate somebody else.\textsuperscript{552} When this tactic failed and Cleveland re-nominated Hornblower as soon as Congress reconvened, Hill sought to block Hornblower’s nomination completely.\textsuperscript{553} After a lengthy career that saw him rise from local ward politics in Elmira, New York, to the state Governor’s office in Albany, to the United States Senate, establishing and utilizing alliances was a game that Hill knew how to play well.\textsuperscript{554}

Public Sentiment Regarding Nominee: At first, public attention toward Cleveland’s nominee was almost universally rosy.\textsuperscript{555} The \textit{American Law Review} announced: “[N]ot a flaw was found in his character as a lawyer or a citizen.”\textsuperscript{556} Prominent New York lawyer Frederic R. Coudert, a man whom many pundits speculated would be Cleveland’s Supreme Court nominee, told the media: “Mr. Hornblower . . . is an excellent lawyer, an honorable man, and possesses the judicial mind. His appointment will do credit to the President.”\textsuperscript{557} Other reports, predominantly from Hornblower’s home state, described Hornblower in similarly glowing terms.\textsuperscript{558} Despite his comparatively young age and lack of judicial experience, most commentators followed the \textit{Washington Post’s} opinion that “notoriety is not essential [to become a good Supreme Court Justice]; prominence is not indispensable.”\textsuperscript{559}

Before long, however, Hill’s campaign started hitting its mark. Gradually, he found New York lawyers who were willing to deliver statements against the nominee.\textsuperscript{560} One attorney, Melville Day, published a pamphlet at Hill’s urging that attacked Hornblower’s decision as the referee in a corporate contract matter, pointing out that the New York State Court of Appeals had overruled Hornblower’s holding and then claiming that the ruling demonstrated Hornblower’s overall incompetence.\textsuperscript{561} A former American Bar Association leader wrote a letter alleging:

\textsuperscript{552} See id. at 564–65.
\textsuperscript{553} See id. at 565–66, 567.
\textsuperscript{554} See id at 566. Adding fuel to the feud was the fact that Cleveland had defeated Hill in the 1892 Democratic presidential primary. See Benett, \textit{supra} note 533.
\textsuperscript{555} See \textit{GEYH}, \textit{supra} note 150, at 196.
\textsuperscript{556} Id.
\textsuperscript{557} Pierce, \textit{supra} note 522, at 561, 563.
\textsuperscript{558} See id. at 563.
\textsuperscript{559} Id.; see \textit{GEYH}, \textit{supra} note 150, at 196; see also \textit{The Black Appointment}, \textit{supra} note 548 (“The nominee, only [forty-two] years of age, was one of the most highly respected members of the New York bar.”).
\textsuperscript{560} See Pierce, \textit{supra} note 522, at 568–70.
\textsuperscript{561} See id. at 568–69.
“[Hornblower] is neither a broad-minded man, nor does he possess... the strong moral sense which is so essential to the make-up of a good judge.”\textsuperscript{562} Albert Walker, a Connecticut attorney and one of Hill’s friends, declared that Hornblower “is not sufficiently endowed, either by nature, or by learning, for the great work of the Supreme Court.”\textsuperscript{563}

Others, however, fought back in Hornblower’s favor, with the New York City Bar Association even making the unprecedented move of publicly endorsing Hornblower’s confirmation.\textsuperscript{564} Certain media outlets, realizing that Hornblower had become a political token in a larger fight, thoroughly criticized Hill and his allies. “It is generally understood that the sole ground for rejecting [Hornblower] rests in the desire of the New York senators to ‘get even’ for the downfall of Maynard and to administer what they think is a rebuke to the [P]resident,” stated the \textit{New York Times}.\textsuperscript{565} The \textit{New York Advertiser} chastised Hill for voting against Hornblower not because Hornblower was unfit to serve on the Court, but rather “on account of the man who made [the nomination].”\textsuperscript{566}

The seesaw battle continued throughout the Judiciary Committee’s consideration of Hornblower’s qualifications and spilled onto the Senate floor.\textsuperscript{567} Finally, after five months of deliberations ended with five hours of politically charged speeches, the Senate voted 30-24 in favor of rejecting Hornblower.\textsuperscript{568} Hill had succeeded in obtaining his vengeance against Hornblower for his

\textsuperscript{562} Id. at 569–70. In this same letter, however, the author acknowledged that Hornblower “was a bright man and an excellent advocate.” Id. at 569.

\textsuperscript{563} Id. at 569.

\textsuperscript{564} See id. at 573.

\textsuperscript{565} GEYH, supra note 150, at 196.

\textsuperscript{566} Pierce, supra note 522, at 568.

\textsuperscript{567} See id. at 572–76. Cleveland defended Hornblower by pointing once again to the lawyer’s lengthy dossier of legal successes. In response to the charge that the majority of these triumphs were on behalf of large corporate interests, the President responded by declaring in writing: “[A] man should not be rejected for the place simply because corporations are among his clients, and I hope you will agree with me that in these days of wildness, conservatism and steadiness should not be at a discount.” Parry-Giles, supra note 98, at 110. Overall, however, Cleveland remained surprisingly detached from the political battles surrounding his nominee. \textit{See, e.g.}, \textit{The Black Appointment}, supra note 548 (noting Cleveland’s unwillingness to use his office to pressure certain senators into voting for Hornblower’s confirmation). According to one historian, Cleveland may have prevailed over Hill by personally recruiting a substantial number of senators who consistently favored protectionist pro-business policies. See BRIDSKY, supra note 515, at 326. At the end of the entire process, however, Hornblower himself noted: “It was characteristic of Mr. Cleveland not only to disdain the arts of conciliation but also to ignore the personal elements in the political world.” Id. at 326–27.

\textsuperscript{568} See Pierce, supra note 522, at 576.
role in the Maynard affair and Cleveland for breaking ranks with the Democratic Party too often.\textsuperscript{569} Upset by this outcome, Cleveland wanted to re-nominate Hornblower, but Hornblower declined, preferring instead to return to his profitable legal practice in New York.\textsuperscript{570} The question of who would fill Blatchford's former seat remained an issue that the President would still need to address.

**H. Wheeler Peckham**

Cleveland prided himself on rarely backing down from a political fight.\textsuperscript{571} Thus, he waited only one week after the Senate rejected Hornblower before choosing a new nominee for the Court.\textsuperscript{572} In doing so, he fired a shot across the bow at Senator Hill. While waging his war against Hornblower, Hill had expressed his preference for New York State Court of Appeals Judge Rufus W. Peckham.\textsuperscript{573} In selecting his new nominee, Cleveland very consciously declined to choose Rufus Peckham.\textsuperscript{574} Instead, the President picked Wheeler Hazard Peckham—Judge Rufus Peckham's brother.\textsuperscript{575}

Wheeler Peckham possessed certain characteristics that Hornblower had lacked. At the age of sixty, he possessed a deeper body of legal work than Hornblower, a direct counter to the critics who claimed that Hornblower was too young to serve effectively on the Court.\textsuperscript{576} He also possessed deeper political ties in New York State, a fact that Cleveland likely hoped would prevent Hill from attacking the new nominee too severely.\textsuperscript{577} Within only a couple of

\textsuperscript{569} While several newspapers correctly identified Hill as the pivotal figure in the campaign to reject Hornblower, the media’s reactions toward this politicking were mixed. The *New York Times* stated that the rejection “vindicated” Hill’s support for a felonious judge in New York at the expense of a meritorious nominee to the Court. *See id.* at 576. On the other side of the spectrum, the *New York Sun* claimed that Hill’s viewpoints were vital to the Senate’s consideration of the nominee, as Hornblower was too insignificant for anyone outside of New York State to know anything about him. *See id.*

\textsuperscript{570} *See* OXFORD COMPANION, *supra* note 131, at 475. Later, Hornblower was appointed to the New York State Court of Appeals, but poor health forced him to resign only one week after taking his seat on the bench. *Id.*

\textsuperscript{571} *See* Pierce, *supra* note 522, at 580–81. He also received support from the “independent” faction in the Senate, a group that at this time was more loyal to Cleveland than his Democratic Party brethren, to resist any temptation to placate Hill’s demands. *See* BRODSKY, *supra* note 515, at 327.

\textsuperscript{572} *See* Supreme Court Nominations, *supra* note 17.

\textsuperscript{573} *See* Pierce, *supra* note 522, at 581.

\textsuperscript{574} *See* BRODSKY, *supra* note 515, at 327.

\textsuperscript{575} *See* id.

\textsuperscript{576} *See* Pierce, *supra* note 522, at 582; *see also* GEYH, *supra* note 150, at 196 (referencing misgivings about Hornblower’s youth and thereby inexperience).

\textsuperscript{577} *See* Pierce, *supra* note 522, at 582.
weeks after Cleveland nominated Peckham, the Senate put the President’s latest maneuver to the test of a vote.\footnote{578}{See Supreme Court Nominations, supra note 17.}

Nominee’s Political Party: Democratic.\footnote{579}{See Benett, supra note 533 (stating that Wheeler Peckham was a member of the Upstate New York faction of Democrats that consistently supported Cleveland’s policies against the objections of Democratic Party members from New York City and other “downstate” areas of New York).}


 Majority Party in Senate: Democratic.\footnote{581}{See Party Division in the Senate, supra note 157.}

Majority Party On United States Supreme Court: Republicans held a slim majority, with Justices David Brewer, Henry Brown, Horace Gray, John Marshall Harlan, and George Shiras, Jr.\footnote{582}{See Compare Supreme Court Justices, supra note 234.}

Democrats on this Court were Chief Justice Melville Fuller, and Justices Howell Jackson and Stephen Field.\footnote{583}{See id.}


President’s Previous Nominations to United States Supreme Court: William Hornblower (rejected).\footnote{585}{See Supreme Court Nominations, supra note 17.}

Number of Years between Nomination Year and Presidential Election Year: Slightly more than two years.\footnote{586}{See Benett, supra note 533.}

Nominee’s Prior Legal Record: Wheeler Peckham’s father was a prominent lawyer, but it was not until spending a year traveling in Europe after leaving college that Peckham decided to enroll in law school.\footnote{587}{See The Nat’l. Cyclopedia of Am. Biography, A Biographical Sketch of Wheeler Hazard Peckham 3 (1912) [hereinafter Biographical Sketch of Wheeler Peckham].}

In 1854, he graduated and began practicing law in Minnesota.\footnote{588}{See id.}

Before long, however, he returned to New York State and engaged in the lucrative practice of representing the legal interests of several large railroad corporations as a member of his father’s law firm.\footnote{589}{See id. at 3–4.}

Peckham’s strong reputation in this line of work likely helped improve his standing in Cleveland’s eyes, as Cleveland was a noted defender of the corporate interests of the nation’s railroads.\footnote{590}{Hornblower, too, had represented large railroads in his practice prior to Cleveland...}
In the early 1870s, Peckham made an unexpected leap into criminal law. Appointed as a “Special Deputy Attorney General” and a “Special Deputy District Attorney,” he led the prosecutorial efforts against New York City Mayor Abraham Oakey Hall. When these efforts proved unsuccessful, Peckham turned his sights to an even bigger prize: William “Boss” Tweed, leader of the Tammany Hall political machine that controlled the patronage appointments in New York City and throughout much of the state. Peckham’s dogged pursuit of Tweed and his followers eventually led to multiple convictions that broke up Tammany Hall, one of the most notable victories against political corruption in the state’s history.

Buoyed by these successes, Peckham campaigned to become the District Attorney of New York County. Cleveland, at that time the Governor of New York State, appointed Peckham to this post in 1883. Yet Peckham’s health failed him, forcing him to resign only a week after taking office. He returned to private practice on Wall Street, seemingly destined to devote the rest of his legal career to representing corporate interests.

In the early 1890s, however, Peckham became the President of the New York City Bar Association. In this role, he quickly engaged in one more key fight against political corruption: the investigation that ultimately found that Deputy Attorney General Isaac P. Maynard had perpetrated election fraud.

Nominee’s Prior Political Record: On paper, Peckham was a Democrat. Like Cleveland, however, he was unafraid to break ranks with members of his own party if he believed that the issue at submitting his name as a nominee to the Court. See supra notes 536–38 and accompanying text.

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591 See Biographical Sketch of Wheeler Peckham, supra note 587, at 4.
593 See Biographical Sketch of Wheeler Peckham, supra note 587, at 4; Wheeler Hazard Peckham, supra note 592.
594 See Biographical Sketch of Wheeler Peckham, supra note 587, at 4; Wheeler Hazard Peckham, supra note 582.
595 See Wheeler Hazard Peckham, supra note 592.
596 See id.
597 See id.
598 See Benett, supra note 533.
599 See Pierce, supra note 522, at 582.
600 See id.
601 See Biographical Sketch of Wheeler Peckham, supra note 587, at 5.
hand demanded such a move. His successful legal battles against Tammany Hall convinced him that a movement away from the old political patronage system was both possible and necessary. Among his chief political allies in New York City was Seth Low, one of the city’s early leaders of the Progressive Era.

Despite these strong political opinions, however, Peckham spent very little time holding formal political positions. Beyond his extremely brief tenure as District Attorney, and his campaign to bring down “Boss” Tweed, most of Peckham’s political work occurred from his own independent initiatives rather than from the obligations of a particular governmental post.

Controversial Topics On Which Nominee Held Publicized Stance:
Peckham’s efforts in governmental reform were the most contentious aspect of his legal career. For two decades prior to his nomination to the Court, he took no prisoners in attacking the Tammany Hall leaders and other executors of “municipal degradation” in both the courts and the press. At least some of his comments drew the ire of his fellow attorneys. When the Senate debated Peckham’s nomination, the President of the New York State Bar Association opposed him on the grounds that “Peckham often expressed his political and professional opinions in language that offended and antagonized those persons who were the object of his criticism.”

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602 See, e.g., Benett, supra note 533 (discussing Peckham’s political battles on Cleveland’s behalf with Democrats from the “downstate” regions of New York); Swindler, supra note 39, at 541 (“But with [Peckham’s] high professional competence went a political independence that both [Hill and fellow New York Senator Edward Murphy, who had joined with Hill in opposing Hornblower] found obnoxious, especially when coupled with their antipathy for Cleveland.”).

603 See Biographical Sketch of Wheeler Peckham, supra note 587, at 5.

604 See id.

605 See Pierce, supra note 522, at 582, 583.

606 See Biographical Sketch of Wheeler Peckham, supra note 587, at 5–6; Benett, supra note 533; Swindler, supra note 39, at 541.

607 See Swindler, supra note 39, at 541; see, e.g., Pierce, supra note 522, at 582.

608 See Biographical Sketch of Wheeler Peckham, supra note 587, at 5, 7. Peckham even hosted a widely attended dinner featuring lectures on the subject of “municipal degradation,” an event that included a speech by Mark Twain and called for the removal of several New York City officeholders. See Talk at City Club Dinner: Members Criticised for Indifference—Mark Twain and Other Notable Speakers Heard, N.Y. TIMES (Jan. 5, 1901), http://query.nytimes.com/mem/archive-free/pdf?res=9C05E6DD1330E132A25756C0A96799C946097D6CF. Serving as the program’s master of ceremonies, Peckham called on city leaders to “organize a power that will overcome present conditions and put in office men who are capable and aggressively so. Vice, that has awakened such an outburst of public opinion, is but one of the things that must go.” Id.

609 See Pierce, supra note 522, at 582, 583, 584, 585–86.

610 Id. at 585–86.
Hill. After the Senate rejected Hornblower, Peckham told members of the media: 
“[S]uch things were to be expected when a reptile like Hill wallows in the dirty politics of the day.”

Just like Hornblower, however, Peckham’s most controversial move proved to be his role on the City Bar Association’s committee that exposed Maynard’s fraudulent behavior. Yet while Hornblower was simply one member of this group, Peckham was the man who organized the entire committee. Furthermore, when Maynard campaigned for a seat on the New York State Court of Appeals in 1893, Peckham had spearheaded the opposition movement against Maynard’s candidacy. Thus, while Hornblower had played a key supporting role in the proceedings that had so greatly infuriated Hill, Peckham was the principal antagonist to Hill’s positions in the entire matter. Once again, Hill sought revenge.

Public Sentiment Regarding Nominee: Most of the media attention following Peckham’s nomination focused on the fight between Cleveland and Hill rather than on the nominee himself. The Nation, a pro-Cleveland publication, declared that the conflict represented “a fight for good government, for good judges, good laws, for political purity, and the fair fame of the American people.” Newspapers opposing the President’s administration carried statements similar to the remarks of the Baltimore American: “What shall be said of the President . . . who nominates men for the highest judicial office on earth chiefly for their personal hostility to Hill, the small politician?”

Yet that “small politician” once again proved to be an effective coalition builder. As he had done during the struggle over Hornblower’s nomination, Hill steadily gathered supporters in the battle against Peckham. He had attacked Hornblower for being

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611 See id. at 582.
612 Id. Peckham went on to declare: “[W]e can get no decent politics until that man Hill is made an end of.” Id.
613 See BRODsky, supra note 515, at 327; Pierce, supra note 522, at 582.
614 See BRODsky, supra note 515, at 327.
615 See Pierce, supra note 522, at 582. Additionally, Peckham had opposed Hill during Hill’s gubernatorial campaign, breaking partisan ranks to support Hill’s Republican opponent, Warner Miller. Id. He also “campaigned vigorously” against Hill’s ultimately successful bid for the United States Senate. See BRODsky, supra note 515, at 327.
616 See BRODsky, supra note 515, at 327; Pierce, supra note 522, at 582.
617 See Pierce, supra note 522, at 583.
618 See id. at 583–85.
619 Id. at 582–83.
620 Id. at 584.
621 See id. at 585–87. If Cleveland believed that nominating Peckham to the Court would
too young; now, he criticized Peckham for being too old.\(^{622}\) He highlighted the fact that Peckham's poor health forced his resignation from the District Attorney's position in New York City and questioned whether Peckham had the stamina to serve on the Court.\(^{623}\) He pointed out occasions when Peckham had refused to follow mainstream Democratic Party stances on key issues and questioned Peckham's loyalty to the party.\(^{624}\) He repeated some of Peckham's strongly worded attacks on the machine politicians and expressed doubts about whether the nominee possessed a true “judicial temperament.”\(^{625}\)

For the second time in two months, Hill's campaign proved successful.\(^{626}\) The Senate rejected Peckham by a vote of 41-32.\(^{627}\) Sixteen of the senators who voted against Peckham's appointment were Democrats, a blatant demonstration of the divisions within the President's party.\(^{628}\) Peckham returned to his work of corporate law and municipal political reform in New York City, never to seek a judicial post again.\(^{629}\) Cleveland abandoned his efforts to preserve the “New York seat” on the Court and nominated Edward Douglas

\(^{622}\) See Geyh, supra note 150, at 196; Pierce, supra note 522, at 586.

\(^{623}\) See id. at 588–89. Hill's campaign on this topic convinced the Rochester Union and Advertiser to claim that Peckham was “just as much a Democrat, no more and no less, in the ranks of the Democratic Party ... as Lucifer is an angel in heaven.” Id. at 588. Unlike his stance during deliberations over Hornblower's nomination, Cleveland proved far more willing to shepherd his latest nominee through the Senate. See Brodsky, supra note 515, at 326–27; Pierce, supra note 522, at 598–99. At first, the President allowed this task to fall to a cadre of Democrats who had remained loyal to the President's Administration: George Gray, William Lindsay, and William F. Vilas. See Pierce, supra note 522, at 591. Collectively, they secured nine statements contradicting Hill's attacks, including a letter from former New York City Mayor William F. Grace praising Peckham and his family for their “unvarying fidelity and constancy to the Democratic principles and to the Democratic [P]arty.” Id. Later, he tried to appease certain Democratic senators who had grown hostile to his Administration by granting key political appointments for them and for their friends, and even withdrawing planned appointments for their rivals. See id. at 599–601.

\(^{624}\) Brodsky, supra note 515, at 327; Pierce, supra note 522, at 583.

\(^{625}\) See Pierce, supra note 522, at 603.

\(^{626}\) See id. at 602.

\(^{627}\) See id. at 603. To a large extent, the rejection—and, in particular, the Democratic Party votes against Peckham—represented an indictment against Cleveland rather than a denouncement of Peckham or an even affirmation of Hill. See, e.g., Brodsky, supra note 515, at 328 (“Few of [the Democrats from the southern and western states] had any use for Hill; like the Republicans, they just wanted to stick it to the President.”); Pierce, supra note 522, at 603 (“Many [senators, however, could not separate Wheeler H. Peckham from the President who nominated him. . . . It was eminently clear that Cleveland had seriously ruptured the Democratic Party.”).

\(^{628}\) See Oxford Companion, supra note 131, at 727.
White of Louisiana to fill Blatchford’s vacancy. The following year, another Court vacancy arose. Cleveland successfully nominated Rufus Peckham—Wheeler Peckham’s brother whose Court appointment Hill had desired years earlier.

I. John Parker

On Inauguration Day in 1929, incoming President Herbert Hoover vowed that his Administration would ensure the “[r]eform, reorganization, and strengthening of our whole judicial and enforcement system.” He insisted that raising the caliber of judges in the federal judiciary would be one of his top priorities. By the end of Hoover’s presidency, his failures in the eyes of the public to respond effectively to the most severe economic depression in history would vastly overshadow any other issues during his time in Washington, including judicial appointments. At the end of Hoover’s first year in office, however, the devastating impact of the stock market crash on October 29, 1929, still had not been fully felt. Therefore, instead of concentrating exclusively on financial issues, many of the nation’s headlines instead focused heavily on the President’s handling of the Supreme Court.

On February 13, 1930, Hoover faced a staunch challenge by “progressives” in Congress who opposed his nomination of Charles Evans Hughes as the Court’s new Chief Justice. Hughes had

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631 See id.
632 See Supreme Court Nominations, supra note 17.
633 See Oxford Companion, supra note 131, at 725–26; Pierce, supra note 522, at 581–82.
635 See id. at 268.
638 See id.; see also Jeff Greenfield, The Supreme Court’s Coming Paralysis, DAILY BEAST (July 22, 2014), http://www.thedailybeast.com/articles/2014/07/22/the-supreme-court-s-coming-paralysis.html (noting that while the Great Depression was deepening when Hoover nominated Parker, the fight in the Senate regarding his nomination focused on civil rights issues and labor issues that were not necessarily directly linked to the stock market crash).
been handpicked by his predecessor, William Howard Taft, who despite failing health allegedly refused to resign from the Chief Justice’s seat until Hoover promised that he would select Hughes to replace him.\(^{640}\) Like Taft, Hughes carried the reputation of a staunch pro-business conservative.\(^{641}\) A coalition on both sides of the political aisle rose up to oppose him, arguing that Hughes would damage the nation by voting to “protect ‘property rights’ above ‘human rights.’”\(^{642}\) Ultimately, the Senate confirmed Hughes by a 52-26 vote.\(^{643}\) The signals from this battle, however, were clear: an unexpected number of both Republicans and Democrats had grown weary with the Court’s old ways of protecting American business interests at all costs.\(^{644}\)

Less than a month after Hughes’s confirmation, Justice Edward Terry Sanford died unexpectedly.\(^{645}\) Immediately, questions logically emerged about whether the conflicts surrounding Hughes’s confirmation would impact the President’s new choice.\(^{646}\) Yet Hoover seemed to pay little attention to the concerns raised by “progressives” from either party.\(^{647}\) Instead, in nominating John Johnston Parker to fill Sanford’s seat, Hoover seemed more concerned about geopolitics.\(^{648}\) Like Sanford, Parker was a southerner.\(^{649}\) Since Hoover’s presidential victory included surprising wins in several southern states, the President likely wanted to continue currying favor with the South, especially since the industrial North was already growing impatient with Hoover’s lack of governmental action following the stock market crash.\(^{650}\)

\(^{640}\) See The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 77 (Del Dickson ed., 2001) [hereinafter The Supreme Court in Conference].

\(^{641}\) See Friedman, supra note 639, at 279.

\(^{642}\) Maltese, supra note 639, at 21.

\(^{643}\) See Friedman, supra note 639, at 279.

\(^{644}\) See Parry-Giles, supra note 639, at 53–54; Maltese, supra note 328, at 21.

\(^{645}\) See The Supreme Court in Conference, supra note 640, at 77; Richard L. Watson, Jr., The Defeat of Judge Parker: A Study in Pressure Groups and Politics, 50 Miss. Valley Hist. Rev. 213, 213 (1963).

\(^{646}\) See, e.g., Peter G. Fish, Perspectives on the Selection of Federal Judges Spite Nominations to the United States Supreme Court: Herbert C. Hoover, Owen J. Roberts, and the Politics of Presidential Vengeance in Retrospect, 77 Ky. L.J. 545, 550 (1989) (discussing whether Hoover’s chosen nominee would alter the Court’s pro-business voting record).

\(^{647}\) See Hoover, supra note 634, at 268–69.

\(^{648}\) See Hoover, supra note 634, at 268; Fish, supra note 646, at 549–50; Watson, Jr., supra note 645, at 213.

\(^{649}\) See Oxford Companion, supra note 131, at 817.

In Parker, Hoover had nominated a southerner, a loyal Republican, and a man who possessed a resume of legal accomplishments that outclassed the vast majority of jurists in the nation. With the following factors in mind, Hoover anticipated a swift confirmation.

Nominee’s Political Party: Republican.
Nominating President’s Political Party: Republican.
Majority Party in Senate: Republican.
Majority Political Party on United States Supreme Court: Republican. The only Democrats on the Court at this time were Justices Pierce Butler and James McReynolds. Chief Justice Hughes was a Republican, as were Justices Harlan Stone, George Sutherland, Louis Brandeis, Willis Van Devanter, and Oliver Wendell Holmes.
Predecessor’s Political Party: Republican.
President’s Previous Nominations to United States Supreme Court: Charles Evans Hughes (confirmed after a difficult confirmation battle within the Senate).
Number of Years between Nomination Year and Next Presidential Election: Approximately two years.
Nominee’s Prior Legal Record: As a student at the University of North Carolina, Parker amassed one of the most remarkable academic records in the school’s history. Without politically connected friends, however, he initially struggled to establish himself as a lawyer. Yet his extraordinary litigation skills and

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651 See, e.g., OXFORD COMPANION, supra note 131, at 817; Garcia, supra note 650, at 465–66; Watson, Jr., supra note 645, at 213; see also RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 26 (2005) (noting that notwithstanding any controversies that his nomination sparked, Parker was largely viewed as an exceptional jurist).
652 See Watson, Jr., supra note 645, at 213; Herbert Hoover: Domestic Affairs, supra note 637.
653 See Garcia, supra note 650, at 465.
655 See Party Division in the Senate, supra note 157.
656 See Compare Supreme Court Justices, supra note 234.
657 See id.
658 See id.
660 See supra notes 639–44 and accompanying text.
662 See Peter G. Fish, A “Freshman” Takes Charge: Judge John J. Parker of the United States Court of Appeals, 1925-1930, 10 J. S. LEGAL HIST. 59, 61 (2002).
663 See id.
intense devotion to his clients eventually made Parker a lawyer in high demand and a man possessing more money than he had ever seen in his lifetime. His practice encompassed all manner of criminal and civil cases, with a clientele that came “from all classes of the people, including laboring people and farmers, white people and colored people.” His representation of these clients brought him everywhere from the lowest local trial courts to the United States Supreme Court, including a nationally recognized victory at the Court for local bankers over the Federal Reserve Bank of Richmond.

A growing involvement in North Carolina’s political affairs soon introduced Parker to Republican leaders in Washington, including President Warren Harding and Vice President Calvin Coolidge. In 1923, Parker was appointed as a special assistant to the Attorney General, focusing on commercial frauds that members of Woodrow Wilson’s Administration allegedly committed during the demobilization of World War I. Although he was unable to secure convictions of the alleged wrongdoers, Parker’s talents in the courtroom amazed many high-ranking members of the federal Department of Justice who publicly expressed their surprised admiration for this lawyer from rural North Carolina.

When a vacancy arose on the federal Court of Appeals for the Fourth Circuit in 1925, Coolidge, now serving as the nation’s President, appointed Parker to this position. Parker arrived at the Fourth Circuit as one of the youngest judges ever to serve on that court’s bench. Once again, however, he quickly dispelled these doubts, demonstrating an uncanny ability to distill complex legal arguments to their fundamental core and gain cohesion among his previously contentious fellow judges. Often, the task of writing the court’s opinion for the most controversial cases fell to Parker, as he was both a “quick worker” and a natural consensus

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664 See id. at 61–62.
665 See id. at 61.
666 See id. at 61–62.
667 See Watson, Jr., supra note 645, at 213.
668 See Fish, supra note 662, at 62–63; Watson, Jr., supra note 645, at 213.
669 See Fish, supra note 662, at 62–63. Among the Justice Department officials whom Parker impressed was Attorney General Harlan Fiske Stone, a future member of the Supreme Court’s bench. See id.
670 See Watson, Jr., supra note 645, at 213.
671 See Fish, supra note 662, at 65, 70 (discussing the doubts that Parker’s senior colleagues on the Fourth Circuit originally harbored toward the new judge).
672 See id. at 67–68.
By the time Hoover nominated him to the Supreme Court, Parker had authored more than one hundred and thirty opinions for the Fourth Circuit. None of these opinions were ever reversed on appeal.

Nominee’s Prior Political Record: Early in his legal career, Parker declared his membership in the Republican Party. For a young lawyer trying to build his practice, it was a curious move. Democratic Party politicians controlled most of the political offices in North Carolina at the time, a common theme throughout the southern states since the Civil War. Parker, however, approved of the Republican Party’s economic stances, repeatedly stating that the “New South” would benefit from the party’s support for a protective tariff and for practices that promoted the interests of large industries.

Believing that politics could bring him “great prestige,” Parker ran repeatedly for political office in his home state. As a Republican, however, his role essentially became that of a sacrificial lamb. In short order, he lost a race for a Congressional seat, for the North Carolina Attorney General’s office, and for Governor of North Carolina. The defeats took their toll on his morale, leading him to declare: “[T]here is nothing so disappointing and heartbreaking as politics.” Still, he managed to gain more votes in these elections than senior Republican leaders predicted, helping Parker obtain unforeseen respect within his party. In particular, his performance in the 1920 gubernatorial race, in which he polled two hundred and thirty thousand votes, led Republicans to believe that Parker could become a keystone to a new Republican foothold within the long-Democratic southern states.

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673 See id. at 67–68.
675 See id. at 10–11.
676 See Watson, Jr., supra note 645, at 213 (stating that Parker declared allegiance to the Republican Party shortly after his graduation from the University of North Carolina).
677 See Fish, supra note 662, at 62; Watson, Jr., supra note 645, at 213.
678 See Fish, supra note 662, at 62.
680 See Fish, supra note 662, at 62.
681 See id.; Fourth Circuit History, supra note 679, at 503.
682 See Fish, supra note 662, at 62.
683 See id.; Fourth Circuit History, supra note 679, at 503.
684 See Fourth Circuit History, supra note 679, at 503 n.241; McCarter, supra note 674.
Controversial Topics On Which Nominee Held Publicized Stance: The most extensive public record on Parker’s positions existed within his multiple Fourth Circuit opinions. Of this vast body of work, however, only one opinion caused any form of controversy after Hoover nominated Parker to the Court. This opinion, however, would prove to be contentious enough to ultimately keep Parker off the federal judiciary’s highest bench.

In 1927, the Fourth Circuit heard the case of United Mine Workers of America v. Red Jacket Consolidated Coal & Coke Co. At issue was an injunction that 316 mine owners in West Virginia obtained in federal district court. If enforced, the injunction would prevent the United Mine Workers union from “agitating” among the workers at these mines. To the owners, the injunction was justified because these miners had signed a “yellow dog contract” forbidding them from joining a union. When thousands of armed union advocates organized a march protesting the owners’ maneuvers, however, the issue became one of national prominence. An armed force supported by the mine owners threatened the marchers, requiring the deployment of federal troops to end the threat peaceably.

Originally, Parker suggested that Judge John Carter Rose, an expert in federal procedure, should write the Fourth Circuit’s opinion in this matter. By this time, however, Rose’s health had declined, and Parker had impressed his colleagues enough that they assigned the opinion to him. In a decision closely aligned with existing United States Supreme Court pro-business precedent on this issue, Parker’s opinion for the unanimous court upheld the injunction against the union.
Shortly following Hoover’s announcement of Parker’s nomination, American Federation of Labor President William Green declared that his national alliance of labor unions had found Parker unfit to serve on the Court. Based solely upon Parker’s opinion in the United Mine Workers case, Green stated that Parker was clearly adverse to all labor interests—a position that Green would ultimately repeat innumerable times to multiple other labor leaders, to the Senate’s Committee on the Judiciary, and to the full Senate itself.

At the same time, Parker’s nomination had raised concerns for Walter White, the Secretary of the National Association for the Advancement of Colored People (“NAACP”). Already, the NAACP had opposed Hoover’s apparent lack of interest in racial issues on the national level, criticizing him for running a “lily-white” White House. After telegraphing friends in North Carolina with questions about Parker’s reputation, White received from an anonymous sender a clipping from the Greensboro Daily News that quoted Parker’s speech accepting the Republican nomination in the 1920 gubernatorial race, stating: “[T]he Negro as a class does not desire to enter politics.” Parker further stated: “The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development when he can share the burdens and responsibilities of government.”

Such a declaration was reason enough for White to announce the NAACP’s opposition to Parker on racial grounds. While no

848–49 (citing Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 261 (1917)). The union, according to Parker, had engaged in a systematic attempt to induce non-unionized workers “in violation of their contracts, to join the union and go on a strike.” United Mine Workers, 18 F.2d at 849. To Parker, these activities represented an unlawful attempt to inhibit the interstate commerce activities of the mines, just as similar activities had violated the owners’ rights to engage in interstate commerce in Hitchman. See id. at 845.

697 See Maltese, supra note 328, at 57–58.


699 See Maltese, supra note 328, at 59, 60; Stathis, supra note 698, at 303.

700 See Megan Ming Francis, Civil Rights and the Making of the Modern American State 96 (2014).

701 See Maltese, supra note 328, at 59.

702 Lewis L. Gould, The Most Exclusive Club: A History of the Modern United States Senate 119 (2005). In this same political campaign speech, Parker stated: “[T]he participation of the negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican party of North Carolina.” Maltese, supra note 328, at 59.

703 See Gould, supra note 702, at 120; Garcia, supra note 650, at 466.
further documents surfaced to paint Parker as a bigot against any particular racial groups, the damage had been done. Parker’s seemingly invincible nomination would face national opposition on the grounds that he was both a racist and an enemy to organized labor.\textsuperscript{704}

Public Sentiment Regarding Nominee: Initially, Parker received almost universal acclimation as an excellent candidate.\textsuperscript{705} Unlike Hughes, Parker’s prior record did not declare him as an unquestionably pro-business jurist.\textsuperscript{706} Furthermore, the diverse mix of his clientele during his successful years practicing law in North Carolina indicated to some people that Parker might even become a relatively progressive member of the Court over time.\textsuperscript{707} While some initial questions emerged over his young age of forty-four years, these issues were dispelled by reviews of his solid record on the Fourth Circuit and during his years in practice.\textsuperscript{708}

Even Green’s strenuous objections about the \textit{United Mine Workers} decision did not immediately shift public sentiment against Parker.\textsuperscript{709} Even John L. Lewis, the President of the United Mine Workers, saw no reason to take an antagonistic stance toward the nominee.\textsuperscript{710} The first President of the North Carolina Federation of

\textsuperscript{704} See Gould, supra note 702, at 120; Garcia, supra note 650, at 466. To an extent, such opposition based on two statements in Parker’s entire political and legal career was a narrow-minded maneuver for all parties involved. As Parker later pointed out, authoring an opinion in the \textit{Red Jacket} case that attempted to reverse \textit{Hitchman} almost certainly would have been overturned by the Supreme Court. \textit{Maltese}, supra note 328, at 57. Indeed, his opinion tempered the broad brushes with which the Court painted its decision in \textit{Hitchman}, refusing to follow \textit{Hitchman}’s ruling that forbade “even undefined hampering of the operations of businesses using constitutionally protected indeterminate employment contracts.” Fish, supra note 662, at 75 (emphasis added). Through this narrower holding, Parker actually demonstrated that he was more willing to grant rights to the unions than the majority of the \textit{Hitchman} Court. \textit{See id.} Regarding his single known speech denouncing integration in political participation, Parker’s statements were responses to criticisms that, because he belonged to “the party of Reconstruction,” he was “courting black votes” for the Governor’s office. \textit{Maltese}, supra note 328, at 59. In that same speech, Parker said: “[T]here is no more dangerous or contemptible enemy of the state than the man who for personal or political advantage will attempt to kindle the flame of racial prejudice or hatred.” \textit{Id.} at 60. Thus, while these remarks certainly did not demonstrate empathy toward the cause of racial integration, one could reasonably wonder whether they were the product of political expediency rather than a genuine expression of deeply rooted racial hatred, particularly given the apparent lack of similar comments from Parker throughout his career. \textit{See id.}


\textsuperscript{706} See Robert E. Conot, \textit{Justice at Nuremberg} 62 (1983); Ross, supra note 705, at 16; Fish, supra note 662, at 81.

\textsuperscript{707} See Maltese, supra note 328, at 57; Fish, supra note 662, at 61; Fourth Circuit History, supra note 679, at 504.

\textsuperscript{708} See McCarter, supra note 674.

\textsuperscript{709} See id.

\textsuperscript{710} See id.
Labor likewise criticized Green’s position, stating that Parker was “reasonably progressive, and entirely trustworthy and honest.”\textsuperscript{711}

When the NAACP entered the fray, however, public opinion about Parker started to shift.\textsuperscript{712} With civil rights leaders and labor leaders both opposing him on a national scale, a number of progressives eventually came to the conclusion that Parker simply could not be the right choice.\textsuperscript{713} While Parker retained plenty of supporters, the controversies about these two issues concerned a number of senators who feared that a vote for Parker would cause them to gain an unpleasant public image as an anti-labor racist.\textsuperscript{714} For these senators, this concern was enough to lead them to vote against the nominee.\textsuperscript{715}

In the end, the opposition movement led by Green and White managed to instill this strain of doubt in just enough senators’ minds to win their battle.\textsuperscript{716} The Senate rejected Parker by a 41-39 margin, with seventeen members of the party to which Parker had held lifelong loyalty joining twenty-three Democrats in voting against his confirmation.\textsuperscript{717} A difficult opinion following Supreme Court precedent and a single speech that expressed racial prejudice had cost him a seat on the Court.\textsuperscript{718}

The defeat clearly bothered Parker.\textsuperscript{719} Still, he returned to the Fourth Circuit and immediately immersed himself in that court’s business once again.\textsuperscript{720} In 1931, he became that court’s Chief Judge,

\textsuperscript{711} Id.

\textsuperscript{712} See Maltese, supra note 328, at 61; McCarter, supra note 674. This is not meant to imply that the labor leaders and the civil rights leaders necessarily collaborated to block Parker’s nomination, as the two groups avoided interactions with one another even during the Senate hearings regarding Parker. Maltese, supra note 328, at 61. Nor is this meant to imply that the racial issue necessarily outweighed labor concerns in the minds of the senators voting on Parker’s nomination. Rather, it was the fact that Parker now faced opposition on two key fronts that started the downslide that ultimately led to his rejection. See, e.g., Stathis, supra note 698, at 303–04.

\textsuperscript{713} See, e.g., Maltese, supra note 328, at 61–69; Oxford Companion, supra note 131, at 719.

\textsuperscript{714} See, e.g., Ross, supra note 705, at 17; Stathis, supra note 698, at 304; McCarter, supra note 674.

\textsuperscript{715} See supra notes 713–14 and accompanying text.

\textsuperscript{716} See Stathis, supra note 698, at 304 (“Had one additional [s]enator voted for Parker, Vice President Charles Curtis would have cast the tie-breaking vote that turned the tide.”).

\textsuperscript{717} Maltese, supra note 307, at 68; Stathis, supra note 698, at 304.

\textsuperscript{718} Sixteen years later, the American Bar Association wrote that the Senate’s rejection of Parker “was one of the most regrettable combinations of error and injustice that has ever developed as to a nomination to the great [C]ourt.” Maltese, supra note 328, at 69.

\textsuperscript{719} In later years, Parker continued to seek nomination to the Court, but never received it from any subsequent President. See Conot, supra note 706, at 62–63; Oxford Companion, supra note 131, at 719.

\textsuperscript{720} See Fourth Circuit History, supra note 679, at 504–05.
a position that he maintained until his death in 1958. As for Hoover, just two days after the Senate rejected Parker, the President nominated Owen Roberts, a Republican lawyer who had investigated Warren Harding’s involvement in the Teapot Dome oil reserve scandals. Roberts received his confirmation with virtually no noticeable opposition from any member of the public or the Senate.

J. Clement Haynsworth

On May 14, 1969, Abe Fortas resigned from the Supreme Court in the midst of a financial conflict of interest scandal. Quickly, President Richard Nixon seized this opportunity to fulfill his campaign promise to appoint “strict constructionist” judges to the Supreme Court. Already, he had delighted many conservatives by replacing liberal Chief Justice Earl Warren with the far more conservative Warren Burger to occupy the Court’s center seat. Now, with the liberal Fortas off the Court, the President had a second opportunity to re-make the Court with the type of Justices that he preferred. His pledge to develop a “Nixon Court,” an effort that united the President with leaders in the Justice Department and the FBI, appeared to be off to the best possible start.

Nixon vowed that “he would not seek racial, religious, or geographical balance in making his appointments to the Supreme Court.” For years, the spot that Fortas occupied was informally seen as the “Jewish seat” on the Court, part of a lineage that passed from “Louis Brandeis to Benjamin Cardozo to Felix Frankfurter to...
Arthur Goldberg,” before Fortas’s appointment. Nixon, however, saw no political advantage to including this tradition. Yet the President did have a strategy in mind beyond appointing a “strict constructionist” jurist to the Court. Like Herbert Hoover, Nixon’s presidential victory occurred partly because of unexpected support from southern voters. Similar to Hoover, Nixon wanted to cultivate an increasingly strong Republican base in the South. Just as Hoover believed that nominating Parker represented a step toward this objective, Nixon felt that “he could do southerners no higher favor than to appoint one of their own to the highest court in the land.”

Nixon’s advisors recommended Fourth Circuit Judge Clement Furman Haynsworth for this job. Haynsworth, a South Carolina native, was a Democrat. After reviewing twelve years of Haynsworth’s judicial opinions, however, Rehnquist concluded that Haynsworth was a “strict constructionist”—a judge who, in Rehnquist’s view, “[would generally] not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs.” The FBI provided a similar opinion of Haynsworth’s jurisprudential stances, with FBI Agent Roland Trent telling Nixon after only a brief investigation that Haynsworth was “very conservative” and “definitely in favor of law and order.”

For Nixon, such commendations were all that he needed to hear. On August 21, 1969, he announced his nomination of Haynsworth to replace Fortas on the Court. Given that the Senate had approved Burger by an overwhelming vote of 74-3, he

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730 Id.; see DEAN, supra note 724, at 14–15.
731 See DEAN, supra note 724, at 14–15.
732 See id. at 15.
734 See Fish, supra note 646, at 549.
735 DEAN, supra note 724, at 15.
736 See id. at 15, 16.
739 DEAN, supra note 724, at 17.
740 See id. (explaining that Nixon quickly made his choice to nominate Haynsworth); JENKINS, supra note 738, at 96.
741 See Supreme Court Nominations, supra note 17.
likely planned on a similar landslide in Haynsworth’s favor.\textsuperscript{742}

Nominee’s Political Party: Democratic.\textsuperscript{743}

Nominating President’s Political Party: Republican.\textsuperscript{744}

Majority Party in Senate: Democratic.\textsuperscript{745}

Majority Political Party on United States Supreme Court: Democratic.\textsuperscript{746}

Justices Thurgood Marshall, Byron White, Hugo Black, William Douglas, and William Brennan, Jr., comprised the Democratic wing of the Court.\textsuperscript{747} Republicans on this Court were Justices Potter Stewart, John Harlan, and the newly appointed Chief Justice Warren Burger.\textsuperscript{748}

Predecessor’s Political Party: Democratic.\textsuperscript{749}

President’s Previous Nominations to United States Supreme Court: Warren Burger (confirmed easily by Senate).\textsuperscript{750}

Number of Years between Nomination Year and Next Presidential Election: Slightly more than three years.\textsuperscript{751}

Nominee’s Prior Legal Record: After graduating from Harvard Law School, Haynsworth became the fifth generation of his family to practice law.\textsuperscript{752} He joined his family’s law firm in Greenville, rising to the level of senior partner in 1946.\textsuperscript{753} He remained in this capacity until 1957, when President Dwight Eisenhower appointed

\textsuperscript{742} See id.; see also DEAN, supra note 724, at 17 (stating that Nixon proceeded with Haynsworth’s nomination even though the FBI’s investigation noted that Haynsworth’s past included at least one ethical concern); JENKINS, supra note 738, at 96–97 (discussing the various troubling factors that Nixon overlooked when nominating Haynsworth to the Court); Fish, supra note 646, at 550 (describing Nixon’s decision to nominate Haynsworth despite likely Senate challenges to his nomination).

\textsuperscript{743} See Supreme Court Nominations, supra note 17.


\textsuperscript{746} See Compare Supreme Court Justices, supra note 234 (showing that the majority of Supreme Court Justices in 1969 were members of the Democratic Party).

\textsuperscript{747} See id.

\textsuperscript{748} See id.

\textsuperscript{749} See id.

\textsuperscript{750} See id.; Supreme Court Nominations, supra note 17.


\textsuperscript{752} See Nation: Judge Clement Haynsworth, Time (Aug. 29, 1969), http://content.time .com/time/subscriber/article/0,33009,901281,00.html.

him to the bench of the Fourth Circuit.\footnote{See id.}

Seven years later, President Lyndon Johnson elevated Haynsworth to Chief Judge of the Fourth Circuit.\footnote{See id.} At the age of fifty-two, he was the youngest circuit court Chief Judge in the nation.\footnote{See id.} Nevertheless, he rapidly garnered respect from his colleagues for his rational and “scholarly” jurisprudence, and for professional mannerisms that a number of commentators described as “courtly.”\footnote{See Bart Barnes, Rejected Nixon Appointee Clement Haynsworth Dies, WASH. POST (Nov. 23, 1989), https://www.washingtonpost.com/archive/local/1989/11/23/rejected-nixon-appointee-clement-haynsworth-dies/c61f534c-0b15-4cbd-89bd-3238d1b0ba67/; Narvaez, supra note 753; Nation: Judge Clement Haynsworth, supra note 752.} By the time Nixon nominated him to the Supreme Court, Haynsworth had participated in more than one thousand decisions on the Fourth Circuit, with more than three hundred signed opinions bearing his name.\footnote{See Narvaez, supra note 753.}

N\textsuperscript{ominee’s Prior Political Record:} Haynsworth was a registered Democrat.\footnote{See id.} However, he never held any political office in the legislative or executive branches of government, and did not appear to have any known political enemies.\footnote{See Supreme Court Nomination Battles, supra note 737.} In this manner, he seemed to be a safe selection for Nixon to make.\footnote{See Lisa Pruitt, Clement Furman Haynsworth Jr. (1912-1989), in 1 GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 361–62 (John R. Vile ed., 2003).}

\textbf{Controversial Topics On Which Nominee Held Publicized Stance:} Like Parker, the greatest record of Haynsworth’s tendencies came from his extensive body of Fourth Circuit opinions.\footnote{See, e.g., Lewis F. Powell, Jr., Clement F. Haynsworth, Jr.—A Personal Tribute, 39 WASH. \\L{}E L REV. 303, 304 (1982); Pruitt, supra note 760, at 363; Barnes, supra note 757; Narvaez, supra note 753; see generally Stephen L. Wasby \\& Joel B. Grossman, Judge Clement F. Haynsworth, Jr.: New Perspective on his Nomination to the Supreme Court, 1990 DUKE L.J. 74, 75–76 (providing a comparison of the many uncanny similarities between the Senate’s rejection of Parker and the Senate’s rejection of Haynsworth).} An in outcome that seemed like \textit{d{é}j{a} vu} when viewed alongside the Parker nomination, the most damaging controversies regarding Haynsworth’s publicized stances focused on a few opinions concerning two topics: civil rights and labor disputes.\footnote{See, e.g., Jonathan L. Entin, The Confirmation Process and the Quality of Political Debate, 11 YALE L. \\& POL’Y REV. 407, 412, 413 (1993); Pruitt, supra note 760, at 363–64; Narvaez, supra note 753.}

Regarding civil rights, Haynsworth’s most contentious opinions focused on the issue of integrating public schools. He wrote

\footnote{See id.}
decisions stating that tuition grants for white students who enrolled in segregated schools were constitutional, striking down the argument that these awards violated the Fourteenth Amendment.\textsuperscript{765} Even more controversially, he affirmed officials' actions in Prince Edward County, Virginia, to shut down public schools rather than racially integrate them.\textsuperscript{766} The majority of the United States Supreme Court did not share this viewpoint, however, resoundingly overruling Haynsworth's position in the Prince Edward County case.\textsuperscript{767} He also wrote a dissenting opinion arguing that private hospitals receiving federal funding should not be compelled to treat African-Americans.\textsuperscript{768} Beyond the courtroom, Haynsworth belonged to several private clubs that supported and practiced racial segregation, a fact that was common to the majority of affluent white southern men during this time period.\textsuperscript{769}

On the labor front, Haynsworth voted seven times in favor of management over labor in cases that the Supreme Court subsequently reversed.\textsuperscript{770} Some of these Supreme Court reversals came by unanimous vote.\textsuperscript{771} While Haynsworth's advocates later provided the Senate a list of thirty-six cases in which the judge cast a pro-labor vote, the label of "anti-union" stuck to Haynsworth throughout the Senate's debates over his nomination.\textsuperscript{772}

The most controversial issues surrounding Haynsworth's nomination, however, arose from senators who were still angry about the Nixon Administration's investigations into the financial scandals that ultimately forced Fortas's resignation from the Court.\textsuperscript{773} These senators pointed to the case of \textit{Textile Workers Union v. Darlington Manufacturing Company},\textsuperscript{774} a matter where Haynsworth refused to recuse himself even though he was a part-

\textsuperscript{765} See Narvaez, supra note 753.
\textsuperscript{766} See Entin, supra note 764, at 412–13; Pruitt, supra note 760, at 364.
\textsuperscript{768} See Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959, 977 (4th Cir. 1963) (Haynsworth, J., dissenting).
\textsuperscript{769} See RANDALL BENNETT WOODS, QUEST FOR IDENTITY: AMERICA SINCE 1945, at 322 (2005).
\textsuperscript{771} See id.
\textsuperscript{772} See Pruitt, supra note 760, at 366; see Barnes, supra note 757; Narvaez, supra note 753. Initially, however, experts believed that Haynsworth's labor law jurisprudence was not damaging enough by itself to produce a Senate rejection. See Entin, supra note 764, at 413 (“AFL-CIO officials anticipated no more than two dozen votes against confirmation on this ground.”).
\textsuperscript{773} See OXFORD COMPANION, supra note 131, at 427.
owner in a vending machine business that contracted with Darlington Manufacturing’s parent company. Haynsworth stated that the relationship between him and Darlington Manufacturing was too remote to warrant his disqualification from the case, and accurately pointed out that the judicial ethics canons of the day did not demand recusal. He also noted that Attorney General Robert Kennedy had investigated the matter at Haynsworth’s request and cleared him of any wrongdoing.

Still, Haynsworth’s critics stated that the Darlington Manufacturing case demonstrated that the judge failed to avoid the “appearance of impropriety” in his courtroom. Their criticisms gained ammunition through a review of a few cases in which Haynsworth did not recuse himself even though he owned stock in one of the businesses involved in the dispute at issue. In one matter, Haynsworth had even purchased shares of stock from a corporation while a case involving that enterprise was still pending at the Fourth Circuit. To each critique, Haynsworth responded that he did not own enough stock to constitute a “substantial” interest in any of the corporations at issue. To Haynsworth’s detractors, however, these issues demonstrated that Nixon had nominated a jurist who was just as unethical and untrustworthy as the man whom Nixon had selected Haynsworth to replace.

Public Sentiment Regarding Nominee: Within a few weeks after Nixon nominated Haynsworth, the nominee received widespread criticism of his record in cases involving civil rights interests.

775 See Douglas, supra note 770, at 393; Entin, supra note 764, at 410–11; Narvaez, supra note 753.
776 See Douglas, supra note 770, at 393; Pruitt, supra note 760, at 366–67.
777 See Wasby & Grossman, supra note 763, at 79, 80.
779 See Entin, supra note 764, at 410–11; Pruitt, supra note 760, at 366–68.
780 See Pruitt, supra note 760, at 367–68.
781 Id.; see Douglas, supra note 770, at 393. As a consequence of this controversy, the statute regarding judicial disqualification was significantly altered, removing the “substantial interest” clause and demanding recusal whenever a judge possessed “any financial interest,” regardless of size or amount, in one or more parties to the case at hand. Entin, supra note 764, at 411 n.20.
782 See, e.g., JEFFRIES, JR., supra note 778, at 226 (“This argument caught and amplified the reverberations from the Fortas affair and lent an air of fine impartiality to the calumnia of Clement Haynsworth.”); Douglas, supra note 770, at 393 (“These ethical concerns received far greater play given the fact that Haynsworth was nominated to fill the seat from which Abe Fortas had previously resigned for alleged ethical shortcomings.”); Tulis, supra note 422, at 1344 (“In rejecting Haynsworth, Democratic [s]enators were surely paying back their Republican counterparts for their rejection of Lyndon Johnson’s nominee for Chief Justice, Abe Fortas.”).
783 See, e.g., Entin, supra note 764, at 412–13; Pruitt, supra note 760, at 364, 365.
Powerful civil rights organizations, including the NAACP, the National Urban League, the Southern Christian Leadership Conference, and the American Jewish Congress all opposed the nomination.784 “If the President is seeking to reach the Negro respectability in a significant way,” wrote the St. Louis Argus, “loading the Supreme Court with individuals who oppose the Federal Government[’s] participation in civil rights programs, equal educational opportunities and protection of our democratic heritage, will not accomplish the task.”785 The Kansas City Call stated: “The black citizens of America have no choice but to fight the Nixon nomination,” and accused Nixon of trying to “pay his political debts at the expense of young black school children and the Negro citizens of this great land.”786

Other commentators assailed Haynsworth’s record on labor matters, an attack urged by leaders of the merged American Federation of Labor-Congress of Industrial Labor.787 Perhaps the most damning editorial, however, came from Washington Post journalists Frank Mankiewicz and Tom Braden, stating: “Judge Haynsworth was in clear violation of the canons of ethics for seven years on the bench, during which time he profited . . . from a company in which he was not just a casual investor, but an insider.”788 Following publication of this column, other journalists scrutinized Haynsworth’s record, with some reaching the conclusion expressed by the New York Post: “We don’t think the nation will enjoy the spectacle of a court jumping out of a Fortas frying pan into a Haynsworth fire.”789

Recognizing that his nominee was not winning favor among the media, Nixon summoned several reporters for an “informal meeting.”790 At this gathering, he angrily accused the journalists of committing “a vigorous character assassination” against Haynsworth.791 He then questioned whether the press used ethical allegations as a pretext because the journalists did not want a

785 Id.
786 Id.
787 See Entin, supra note 764, at 412 (“The AFL-CIO made the defeat of Haynsworth one of its major priorities.”); see also Pruitt, supra note 760, at 366 (“In addition to his record on civil rights cases, Haynsworth’s relationship to labor and business became a lightning rod for opposition to his nomination.”).
788 Opposition to Haynsworth Mounts, supra note 784, at 5.
789 Id.
790 Parry-Giles, supra note 98, at 114.
791 Id.
southern strict constructionist on the Court, lecturing the reporters: “[I]t is not proper to turn down a man because he is a southerner, because he is a Jew, because he is a Negro, or because of his philosophy.”792

Some powerful individuals spoke in Haynsworth’s favor, though. Lawrence Walsh, Chairman of the American Bar Association’s Standing Committee on the Federal Judiciary, stated that the Committee was “unanimously of the opinion that Judge Haynsworth was highly acceptable from the viewpoint of professional qualification,” and personally declared that Haynsworth was “beyond any reservation, [and] a man of impeccable integrity.”793 Senator Marlow Cook of Kentucky declared that Haynsworth was “a man of honesty and integrity.”794 Shortly before his brethren voted on the matter, Senator Roman Hruska posed the question to his colleagues: “Where do we go from here, if there is a rejection of the nominee? It will amount to a rejection of the President’s plan to make appointments to the Supreme Court which will restore balance.”795

The issue of restoring balance, however, evidently did not sway the minds of the majority of senators.796 Haynsworth’s nomination was defeated by a vote of 55-45, despite a last-gasp all-out attempt by Nixon to sway enough legislators in the nominee’s favor.797 Seventeen Republican senators voted against the candidate put forth by the President from their political party.798 In part, this result may have been attributable to the death of Senate Republican leader Everett Dirksen shortly before the chamber’s hearings regarding Haynsworth began, leaving the party’s Senate leadership in the hands of Robert Griffin and Hugh Scott.799 Both Griffin and Scott faced impending re-election campaigns, making it

792 Id.
793 Powell, Jr., supra note 763, at 305. All but one of the past presidents of the American Bar Association living at the time of Haynsworth’s nomination supported his confirmation to the Court. See id.
794 Haynsworth Backers Reply to Criticism, EXPRESS & NEWS (San Antonio, Tx.), Oct. 11, 1969, at 3-A.
795 Parry-Giles, supra note 98, at 114.
796 See infra note 797 and accompanying text.
797 Parry-Giles, supra note 98, at 114; see THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS 425 (2d ed., Kermit L. Hall & James W. Ely Jr. eds., 2009) [hereinafter OXFORD GUIDE].
798 Narvaez, supra note 753. Likewise, plenty of senators from Haynsworth’s own Democratic Party voted against him, in part out of spite for Nixon’s efforts to force Fortas, a far more liberal Democrat than Haynsworth, off of the Court. See Tulis, supra note 422, at 1344.
799 See Douglas, supra note 770, at 393–94.
politically impossible for them to support a judicial candidate who had been branded as an unethical anti-labor segregationist.\textsuperscript{800}

Beyond this, however, most commentators saw Haynsworth’s defeat as successful vengeance by senators embittered by the investigation leading to Fortas’s resignation.\textsuperscript{801} Evidence suggests that Nixon viewed it in this context.\textsuperscript{802} Shortly after Haynsworth returned to his position at the helm of the Fourth Circuit, a post that he would hold until taking senior status in 1981, Nixon publicly declared that the “majority of people in the [n]ation regret” Haynsworth’s rejection.\textsuperscript{803} Then the President promised that he would employ the same criteria that he used in selecting Haynsworth to pick a new nominee to fill Fortas’s vacated seat.\textsuperscript{804}

\textbf{K. George Harrold Carswell}

Nixon deliberated for nearly two months before announcing his new choice to replace Fortas on the Court.\textsuperscript{805} Initially, his selection seemed in many ways similar to Haynsworth.\textsuperscript{806} George Harrold Carswell was a southerner, born in Georgia and residing in Florida.\textsuperscript{807} He was a circuit court judge, serving on the Court of Appeals for the Fifth Circuit.\textsuperscript{808} He was a conservative jurist and a “strict constructionist” within the President’s parameters of these often-malleable terms.\textsuperscript{809}

\begin{footnotes}
\item See id. at 394.
\item See, e.g., Pruitt, supra note 760, at 368; Tulis, supra note 422, at 1344.
\item See, e.g., DEAN, supra note 724, at 18 (“Nixon’s advisors recognized this fact, as surely did the [P]resident.”); Parry-Giles, supra note 98, at 114; Tulis, supra note 422, at 1345.
\item Parry-Giles, supra note 98, at 114. Haynsworth went on to receive high acclaim for his subsequent service on the Fourth Circuit, with Congress ultimately naming the federal courthouse in Greenville, South Carolina, in his honor. See Pruitt, supra note 760, at 368.
\item See Parry-Giles, supra note 98, at 114.
\item The Senate voted to reject Haynsworth on November 21, 1969, and Nixon announced Carswell’s nomination on January 19, 1970. Supreme Court Nominations, supra note 17.
\item See Woods, supra note 769, at 322.
\item See John Paul Hill, Nixon’s Southern Strategy Rebuffed: Senator Marlow W. Cook and the Defeat of Judge G. Harrold Carswell for the U.S. Supreme Court, 112 REG. KY. HIST. SOC’Y 613, 614 (2014).
\item See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 282–83 (2009); DOUGLAS E. SCHÖEN, THE NIXON EFFECT: HOW RICHARD NIXON’S PRESIDENCY FUNDAMENTALLY CHANGED AMERICAN POLITICS 33, 34 (2016). Interestingly, Nixon first made his pledge to appoint “strict constructionist” judges before an election address televised to southern viewers, thus seemingly making the appointment of strict constructionists to the Court a component of his strategy to curry favor with voters in the South. See FRIEDMAN, supra note 809, at 282.
\end{footnotes}
In one vital area, however, the President ensured that Carswell was different from Haynsworth. Before announcing Carswell’s nomination, Nixon ensured that his advisors meticulously vetted the judge for any possible co-mingling of judicial duties and business interests.\(^7\) Only after receiving repeated assurances that Carswell would not raise any comparisons with Fortas and Haynsworth in the realm of alleged financial improprieties did Nixon declare that Carswell was his choice.\(^8\)

Yet Carswell quickly proved to be anything but controversy-free.\(^9\) Within days, the President found himself once again embroiled in an exhaustive effort to defend his nominee’s reputation on the national stage.\(^10\)

Nominee’s Political Party: Republican (but previously a Democrat).\(^11\)

Nominating President’s Political Party: Republican.\(^12\)

Majority Party in Senate: Democratic.\(^13\)

Majority Political Party on United States Supreme Court: Democratic.\(^14\) Justices Thurgood Marshall, Byron White, Hugo Black, William Douglas, and William Brennan, Jr., comprised the Democratic wing of the Court.\(^15\) Republicans on this Court were Justices Potter Stewart, John Harlan, and the newly appointed Chief Justice Warren Burger.\(^16\)

Predecessor’s Political Party: Democratic.\(^17\)

President’s Previous Nominations to United States Supreme Court: Warren Burger (confirmed easily), Clement Haynsworth (rejected by a vote of 55-45).\(^18\)

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\(^7\) See Hindley, supra note 808.

\(^8\) See DEAN, supra note 724, at 19; Parry-Giles, supra note 98, at 115; Hindley, supra note 808. John Mitchell, Nixon’s Attorney General, referred to Carswell as “too good to be true” for the President’s “strict constructionist” and “law and order” objectives, with a record that was free of the type of financial improprieties that had helped torpedo Haynsworth’s nomination. See DEAN, supra note 724, at 19.

\(^9\) See, e.g., SCHOEN, supra note 809, at 33; Parry-Giles, supra note 98, at 115; Hindley, supra note 808.


\(^11\) See Hindley, supra note 808.

\(^12\) See id.

\(^13\) See id.

\(^14\) See Compare Supreme Court Justices, supra note 234.

\(^15\) See id.

\(^16\) See id.

\(^17\) See id.

\(^18\) See id.

\(^19\) See id.

\(^20\) See id.

\(^21\) See OXFORD GUIDE, supra note 797, at 425.
Number of Years between Nomination Year and Presidential Election: Approximately two years.\textsuperscript{822}

Nominee's Prior Legal Record: Carswell enrolled in law school at the University of Georgia, left school to serve in the United States Navy, and then completed his law degree at Mercer University.\textsuperscript{823} Moving with his wife to Tallahassee, Florida, Carswell entered the private practice of law in 1948.\textsuperscript{824} Five years later, Eisenhower appointed Carswell to become the United States Attorney for the Northern District of Florida.\textsuperscript{825}

Five years after that, Eisenhower appointed Carswell to preside over the United States District Court in Florida’s Northern District.\textsuperscript{826} Carswell’s jurisprudence received mixed reviews during his eleven years as a district court judge.\textsuperscript{827} Forty percent of his decisions were subsequently reversed on appeal.\textsuperscript{828} While some practitioners praised his work, others—particularly civil rights lawyers—found him abrasive and fully willing to dismiss their suits without even granting a hearing.\textsuperscript{829}

Despite this varying record, or perhaps because of it, Nixon appointed Carswell to the Fifth Circuit on May 12, 1969. Only half a year later, Nixon nominated Carswell to the Supreme Court.\textsuperscript{830}

Nominee’s Prior Political Record: Carswell’s first venture into

\textsuperscript{822} See Historical Election Results, supra note 751; Supreme Court Nominations, supra note 17.
\textsuperscript{823} See Nomination of George Harrold Carswell, of Florida, to be Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary, 91st Cong. 8 (1970) [hereinafter Nomination].
\textsuperscript{824} See Hindley, supra note 808.
\textsuperscript{825} See Carswell Nomination to Court Rejected by Senate, CQ PRESS: CQ ALMANAC (1970), https://library.cqpress.com/cqalmanac/document.php?id=equal70-1292761; Hindley, supra note 808. In this position, Carswell developed a “law and order” reputation that pleased many of the Republican politicians that had recently obtained power on the federal level. See Dean, supra note 724, at 19.
\textsuperscript{826} See Dean, supra note 724, at 19; Carswell Nomination to Court Rejected by Senate, supra note 825. This appointment made the thirty-eight-year-old Carswell the youngest federal judge in the nation. See Dean, supra note 724, at 19; Carswell Nomination to Court Rejected by Senate, supra note 825.
\textsuperscript{828} See Woods, supra note 769, at 322; Hill, supra note 807, at 615.
\textsuperscript{829} See Dean, supra note 724, at 19; Woods, supra note 769, at 322; Grossman & Washby, supra note 23, at 571; Hill, supra note 807, at 615.
\textsuperscript{830} See Hindley, supra note 808.
politics came as a registered Democrat. 831 However, Carswell lost his attempt to win a seat in the state legislature of Georgia, stimulating Carswell to move to Florida and shift his party membership to the Republicans. 832 He retained his alliance with the conservative wing of the Republican Party for the remainder of his life. 833

Controversial Topics On Which Nominee Held Publicized Stance:
Without question, Carswell’s most controversial viewpoints dealt with civil rights. 834 Two days after Nixon announced Carswell’s nomination, media outlets revealed the text of a speech that Carswell delivered during his legislative campaign in Georgia. 835 “I am a southerner by ancestry, birth, training, inclination, belief, and practice,” Carswell declared in that address, “I believe that segregation of the races is proper and the only practical and correct way of life in our states.” 836

After publication of this speech, the backlash against Carswell was swift and fierce. 837 Caught off guard, Nixon’s Administration tried to hurriedly rehabilitate Carswell’s image. 838 When Carswell spoke before the Senate Judiciary Committee, the judge renounced the words of that speech as the language of an uninformed man. 839 “I state now as fully and completely as I possibly can, that those words themselves are obnoxious and abhorrent to me,” Carswell said. 840 He also stated: “I am not a racist. I have no notions, secretive, open, or otherwise, of racial superiority.” 841 He continued

831 See id.
832 See id.
834 See SCHOEN, supra note 809, at 33; Grossman & Wasby, supra note 23, at 574; Hill, supra note 807, at 614–15; Carswell Dies, supra note 833. According to at least one commentator, Nixon intentionally selected a nominee who was “even more anti-civil rights” than Haynsworth to demonstrate his contempt toward the Senate and his respect for the viewpoints favored in many southern states. See DREW, supra note 813, at 44.
835 See Hindley, supra note 808.
836 Id.
837 See RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 459 (2008); Hindley, supra note 808; see generally DEAN, supra note 724, at 20 (discussing the multitude of information dug up against Carswell).
838 See PERLSTEIN, supra note 837, at 459 (discussing a press conference at which Nixon declared that he still would have nominated Carswell even if he had known about Carswell’s remarks about white superiority); Hindley, supra note 808 (“The White House tried to suggest that the words were merely attributed to Carswell, but the speech had been printed in the Irwinton Bulletin, a weekly newspaper run by Carswell while at Duke.”).
839 See Hindley, supra note 808.
840 Id.
841 Id.
by calling the Georgia speech “something out of the disembodied past.”

Perhaps Carswell would have passed through the hearings unscathed if questions surrounding his civil rights record ended with this statement. Yet more issues rapidly appeared on the radar. Carswell had helped create a private corporation to take over a public golf course facing federal orders to desegregate. He had drafted a charter for a “whites only” booster club at Florida State University. He had purchased and sold real estate “contain[ing] a racially restrictive covenant” in the deed. Several attorneys described Carswell’s overt hostility toward them in matters where they represented individual civil rights interests. With each of these revelations, Carswell’s confirmation chances dimmed further.

Some observers also focused on the frequency at which higher courts reversed Carswell’s holdings as a district court judge. Some of the most egregious examples of poor judicial logic, according to members of the Judiciary Committee, came in Carswell’s civil rights decisions. This led to questions about whether Carswell possessed the intellect and ability to serve on the highest court in the federal system.

Public Sentiment Regarding Nominee: Unsurprisingly, civil rights groups mounted a staunch opposition to Carswell’s nomination. Feminist leader Betty Friedan became a leading voice in the movement to reject the nominee. Leroy Clark of the NAACP proclaimed that Carswell consistently behaved in an “insulting and

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842 Id.
843 See Grossman & Washy, supra note 23, at 574 (stating that most senators were willing to forgive Carswell’s campaign comments if this were the only instance of racist actions in the nominee’s past).
844 See Perlestein, supra note 837, at 459; Grossman & Washy, supra note 23, at 574.
847 Hill, supra note 807, at 615; see Dean, supra note 724, at 20; Woods, supra note 769, at 322.
848 See supra notes 836–47 and accompanying text.
849 The most widely cited study regarding this frequency of reversals came from the Ripon Society of “liberal Republicans” and Columbia University’s “Law Students Concerned for the Court.” See Hill, supra note 807, at 615.
850 See Hindley, supra note 808.
851 See, e.g., Dean, supra note 724, at 21; Woods, supra note 769, at 322; Kalk, supra note 827, at 261.
852 See supra notes 834, 837 and accompanying text.
hostile” manner toward non-white lawyers.\textsuperscript{854} Meanwhile, Carswell’s supporters seemed to become increasingly subdued, both in the Senate and in the general public, with each new piece of unexpected news about Carswell’s background brought to light.\textsuperscript{855} Additionally, many legal leaders publicly declared their concerns about Carswell’s many decisions that higher courts reversed, along with the short length and scarcity of citations in many of Carswell’s signed opinions.\textsuperscript{856} Yale Law School Dean Lewis Pollack evaluated Carswell’s work as representing “at very best a level of modest competence, no more than that,” and declared that Carswell held “more slender credentials than any other nominee put forth this century.”\textsuperscript{857} In a now-infamous attempted rebuttal to such critics, Republican Senator Roman Hruska stated: “[E]ven if he were mediocre, there are lots of mediocre judges and people and lawyers. They’re entitled to a little representation, aren’t they? We can’t have all Brandeises, Frankfurters and Cardozos and stuff like that out there.”\textsuperscript{858}

The Senate ended their discussions regarding Carswell after five days, seeing the writing on the wall.\textsuperscript{859} In the end, the vote was closer than expected, but the outcome was predictable. The Senate voted 51-45 to reject Carswell, with thirteen Republican senators crossing party lines to vote against him.\textsuperscript{860} Many of the nation’s large newspapers congratulated the Senate on voting against the nominee.\textsuperscript{861} For the second time in only a few months, Nixon was furious, announcing to the media that the Senate rejected Carswell solely because they refused to accept a Justice from the South.\textsuperscript{862}

Carswell returned to Florida and attempted to run for a seat in the Senate, using the slogan: “This time the people decide,” as his campaign’s battle cry.\textsuperscript{863} After he lost that race, he resumed work as a private practitioner of law.\textsuperscript{864} Meanwhile, Nixon abandoned his

\textsuperscript{854} Hindley, supra note 808.
\textsuperscript{855} See Grossman & Wasby, supra note 23, at 574.
\textsuperscript{856} See DEAN, supra note 724, at 21; Hindley, supra note 808.
\textsuperscript{857} Kalk, supra note 827, at 261; see Hindley, supra note 808.
\textsuperscript{858} Kalk, supra note 827, at 261.
\textsuperscript{859} See Hindley, supra note 808 (“The hearings were closed, after five days, when it became clear that no amount of pro-Carswell witnesses could undo the testimony given about his civil rights record.”).
\textsuperscript{860} See DEAN, supra note 724, at 21.
\textsuperscript{861} See generally In the Nation’s Press: The Carswell Defeat, CRISIS, Apr. 18, 1970, at 168–70 (providing examples of media praise from both sides of the political aisle regarding the Senate’s vote to reject Carswell).
\textsuperscript{862} See SCHOEN, supra note 809, at 33.
\textsuperscript{863} Hindley, supra note 808.
\textsuperscript{864} See id.
quest to appoint a southern Justice. Minnesota Republican Harry Blackmun became the President’s new choice.\textsuperscript{865} After just a few hours of deliberation, the Senate confirmed Blackmun to the Court by a lopsided vote of 94-0.\textsuperscript{866}

\textit{L. Robert Bork}

On September 26, 1986, President Ronald Reagan presided over the investiture of two new members of the Supreme Court.\textsuperscript{867} William Rehnquist, the new Chief Justice, had survived a moderate amount of public controversy before the Senate confirmed him by a vote of 65-33.\textsuperscript{868} Antonin Scalia had sailed through the Senate with a unanimous vote of approval.\textsuperscript{869} For a President who had vowed—as Nixon and Hoover had done before him—to repair the federal judiciary by appointing judges who were conservative, tough on crime, and strict constructionists, it was a glorious day.\textsuperscript{870}

In this highly publicized moment, Reagan seized the opportunity to again declare his views about the Supreme Court’s proper role.\textsuperscript{871} “[The Founding Fathers] settled on a judiciary that would be independent and strong,” Reagan declared, “but one whose power would also, they believed, be confined within the boundaries of a written Constitution and laws.”\textsuperscript{872} The need for “judicial restraint,” Reagan continued, was one of the only subjects on which both Thomas Jefferson and Alexander Hamilton agreed, as a judiciary of strictly limited powers was necessary for the nation to survive.\textsuperscript{873}

He then listed Oliver Wendell Holmes as a great proponent of

\textsuperscript{865} See SCHOEN, \textit{supra} note 809, at 34. This was a choice that Nixon would ultimately deeply regret. \textit{See id.} (“Blackmun was seen as a law-and-order man, and in the early years of his tenure, he cast mostly conservative votes. But in time, he became a key cog of the [C]ourt’s liberal wing, famously writing the \textit{Roe v. Wade} opinion legalizing abortion and, two decades later, coming out against the death penalty.”).

\textsuperscript{866} See \textit{supra} note 17.


\textsuperscript{868} \textit{Supreme Court Nominations, supra} note 17.

\textsuperscript{869} See \textit{id.}

\textsuperscript{870} See DAVID MERVIN, \textit{RONALD REAGAN AND THE AMERICAN PRESIDENCY} 146, 147 (1990); \textit{see also} Neil A. Lewis, \textit{Bush Picking the Kind of Judges Reagan Favored}, \textit{N.Y. TIMES} (Apr. 10, 1990), http://www.nytimes.com/1990/04/10/us/bush-picking-the-kind-of-judges-reagan-favor ed.html (“In the Reagan Administration, candidates for the Federal bench were screened by the Justice Department’s Office of Legal Policy under Attorney General Edwin Meese 3d, who was outspoken in calling for transforming the judiciary.”).

\textsuperscript{871} Reagan, \textit{supra} note 867.

\textsuperscript{872} \textit{Id.}

\textsuperscript{873} \textit{Id.}
judicial restraint, and quoted Felix Frankfurter: “The highest exercise of judicial duty is to subordinate one’s personal pulls and one’s private views to the law.”\textsuperscript{874} “Chief Justice Rehnquist and Justice Scalia have demonstrated in their opinions that they stand with Holmes and Frankfurter on this question,” the President said.\textsuperscript{875} “I nominated them with this principle very much in mind.”\textsuperscript{876}

Eight months later, Reagan again returned to the subject of “judicial restraint.”\textsuperscript{877} This time, the subject was his nomination to replace the retiring Justice Lewis F. Powell, Jr., an unpredictable jurist who frequently cast the Court’s swing vote in heavily contested cases.\textsuperscript{878} To replace this longtime pragmatic moderate, Reagan selected Robert Heron Bork, a current member of the United States Court of Appeals for the District of Columbia and a former Solicitor General under Nixon.\textsuperscript{879} In his press conference introducing Bork to the nation, Reagan came back to a now-familiar topic:

Judge Bork, widely regarded as the most prominent and intellectually powerful advocate of judicial restraint, shares my view that judges’ personal preferences and values should not be part of their constitutional interpretations. The guiding principle of judicial restraint recognizes that under the Constitution it is the exclusive province of the legislatures to enact laws and the role of the courts to interpret them.\textsuperscript{880}

Outwardly, Reagan projected the impression that he expected the Senate to easily confirm Bork, just as they had done with Scalia and with Reagan’s first Court selection, Sandra Day O’Connor.\textsuperscript{881} Several senators, however, declared that Bork would face a battle far tougher than any of Reagan’s nominees thus far.\textsuperscript{882} Even before
Reagan had nominated Bork to the Court, the judge had firmly established himself as one of the most polarizing figures in the entire nation.\footnote{See Jamie Kalven, Robert Bork and the Constitution, Invisible Inst., http://invisible.institute/robert-bork-and-the-constitution/ (last visited Nov. 21, 2016).} Already, he had delivered multiple public declarations against statutes and Supreme Court decisions involving abortions, homosexuality, affirmative action, civil rights initiatives, antitrust laws, and freedom of speech.\footnote{Criticism of Robert Bork, together with fear from many commentators that Reagan would nominate Bork to the Supreme Court, began several years before the nomination actually occurred. See Ethan Bronner, A Conservative Whose Supreme Court Bid Set the Senate Afire, N.Y. Times (Dec. 19, 2012), http://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html (describing the divisive effects of Bork’s circuit court decisions and public proclamations about many of the most controversial topics facing the nation at the time of his confirmation hearings).} With this highly publicized record already entrenched, the notion of Robert Bork deciding cases on the highest court in the federal judiciary was too much for the leaders of many interest groups to bear.\footnote{885 See Pub. Citizen Litig. Grp., The Judicial Record of Judge Robert H. Bork (1987), reprinted in 9 CARDOZO L. REV. 297, 298 (1987) (describing the entirety of Bork’s record with special focus on the issues outlined above).} The President’s latest standard bearer of judicial restraint was in for an extremely unrestrained fight.\footnote{886 That fight, and Bork’s eventual lopsided rejection by the Senate, ultimately gave birth to a new verb: “to bork,” meaning “to attack a person’s reputation and views unfairly.” Pomerance, supra note 884, at 224.}

Nominee’s Political Party: Republican.\footnote{See Pub. Citizen Litig. Grp., supra note 884; Bronner, supra note 883; Greenhouse, supra note 882; Kalven, supra note 883; Lacayo, supra note 879; Vigilante, supra note 879.}

Nominating President’s Political Party: Republican.\footnote{887 See Rupert Cornwall, Robert Bork: Jurist who was rejected for the Supreme Court, Independent (Dec. 25, 2012), http://www.independent.co.uk/news/obituaries/robert-bork-jurist-who-was-rejected-for-the-supreme-court-8431146.html.}

Majority Political Party on United States Supreme Court: Reagan’s appointments had transformed the partisan balance on the Court. Republicans now held the majority of votes, with Reagan appointees Chief Justice Rehnquist and Justices Scalia, and O’Connor joining Justices John Paul Stevens and Harry Blackmun to comprise the Court’s Republican membership.890 The Court’s Democratic wing consisted of Justices Byron White, Thurgood Marshall, and William Brennan, Jr.891

Predecessor’s Political Party: Democratic.892

President’s Previous Nominations to United States Supreme Court: Sandra Day O’Connor (unanimously confirmed), Antonin Scalia (unanimously confirmed), and William Rehnquist (confirmed by a vote of 65-33).893

Number of Years between Nomination Year and Next Presidential Election: One year.894

Nominee’s Prior Legal Record: Bork received his legal training at the University of Chicago School of Law.895 The school’s leading role in the “Law and Economics” movement tremendously influenced Bork’s future viewpoints, with individuals such as conservative economist Aaron Director serving as key mentors for the future judge.896 When he entered law school, Bork planned to represent labor unions.897 After spending time immersed in the University of Chicago’s laissez-faire teachings, however, Bork abandoned those early plans and decided to devote his life to fighting antitrust legislation.898

Bork fulfilled this latter objective with the prestigious Chicago firm of Kirkland & Ellis.899 Finding that the daily rigors of practice were not intellectually stimulating enough, he took a substantial pay cut to leave the firm and accept a professorship teaching constitutional law and antitrust law at Yale Law School, where he claimed that he was the only conservative on the entire faculty.900
In 1972, he accepted Nixon’s offer to leave the academic realm and become the Solicitor General of the United States.\(^9\) Immediately after arriving in Washington, Bork faced the unpleasant entanglements of Nixon’s infamous Watergate scandal.\(^9\) When Special Prosecutor Archibald Cox demanded that Nixon produce tapes of conversations that occurred in the White House, Nixon ordered that his Attorney General terminate Cox’s employment.\(^9\) Both Nixon’s Attorney General and Nixon’s Deputy Attorney General resigned rather than carry out the President’s demand.\(^9\) Ultimately, the task of firing Cox fell to Bork—an act that the D.C. Circuit later deemed to constitute obstruction of justice.\(^9\)

In the late-1970s, Bork returned to Yale, espousing legal stances that were more controversial than ever.\(^9\) On February 9, 1982, Reagan appointed him to the D.C. Circuit.\(^9\) His voting record on the D.C. Circuit demonstrated support for positions that he had advocated for prior to entering the judiciary: First Amendment protection only for speech and expression that dealt with political affairs; an extremely limited application of the Equal Protection Clause; and a suspicious view of civil rights initiatives and other programs that imposed new governmental requirements upon private businesses.\(^9\)

Nominee’s Prior Political Record: Growing up in suburban Pittsburgh, Pennsylvania, Bork originally declared that he was a Socialist.\(^9\) By the time he graduated from the University of

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\(^9\) See Pomerance, supra note 884, at 229.

\(^9\) See id.


\(^9\) See ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 68–72 (1989); Pomerance, supra note 884, at 229.


\(^9\) See Pomerance, supra note 884, at 227.
In 1964, he received praise from leaders in the Republican Party for his work on Barry Goldwater’s presidential campaign. He gained further acclaim for advising Nixon in the 1968 and 1972 presidential elections.

Bork’s appetite for direct involvement in political affairs seemed to decline somewhat during his tenure as Nixon’s Solicitor General. Carrying out Nixon’s order to fire Cox gained him the unpleasant reputation of being “Nixon’s henchman,” and the overall climate in Washington during the Watergate affair bothered him significantly. When he returned to teach at Yale, many people suspected that Bork preferred the academic life to a position in public service. However, when Reagan offered Bork the opportunity to join the D.C. Circuit, he accepted the opportunity.

Controversial Topics On Which Nominee Held Publicized Stance: Perhaps more than any other nominee examined in this article, the outspoken and unyielding Bork presented himself to the President, the Senate, and the public as an open book. Multiple articles, speeches, and court opinions offered plenty of grist for the mill for both his supporters and his detractors.

Bork first’s widespread controversy occurred after he published an article in the Indiana Law Journal calling for a strictly constrained application of the First Amendment’s free speech protections. Under Bork’s analysis, the drafters of the Bill of Rights intended the First Amendment to protect only “speech

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910 See id. at 227–28.
911 See id. at 228.
912 See id.
913 See BRONNER, supra note 906, at 65.
915 See BRONNER, supra note 906, at 65, 68–71.
916 See Pomerance, supra note 884, at 229.
918 Some observers argue that the degree to which the Senate used Bork’s past statements against him encouraged future Presidents to nominate prospective Justices with few or no known views on major issues. See, e.g., Cohen, supra note 917.
919 See Bork, Neutral Principles, supra note 884, at 26–27.
concerned with government behavior, policy or personnel.”920 This framework excised First Amendment protection for scientific theories, works of art and literature, commercial advertisements, protests advocating the overthrow of the existing form of government, educational debates about non-political themes, and several other areas of speech that existing Supreme Court caselaw safeguarded.921 Anything short of this bright-line rule protecting only political speech, according to Bork’s article, would open the door for rampant judicial activism among federal and state court judges.922 While Bork later professed to relax his stance somewhat regarding the First Amendment, he continued to maintain a viewpoint that a limited application of the First Amendment was necessary.923

A second controversy arose from Bork’s book, *The Antitrust Paradox: A Policy at War with Itself*.924 Published in 1978, Bork devoted the book to his arguments against the nation’s existing antitrust policies, asserting that antitrust laws actually harmed consumers by shielding shoddy businesses and consequently causing market prices to rise.925 One commentator pointed out that *The Antitrust Paradox*, coupled with Bork’s other writings from the late-1970s and early-1980s, heralded Bork’s rapidly intensifying belief that “egalitarianism went hand in hand with permissiveness” and, by extension, eventual downfall and disaster for the nation.926

Bork wrote that *Harper v. Virginia Board of Elections*,927 the Supreme Court decision that invalidated the use of poll taxes in state elections, represented a prime example of illegitimate judicial activism.928 He declared that a constitutional right to privacy was “utterly specious” and “intellectually empty.”929 He stated that the concept of “one man, one vote” that governed the Court’s

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920 Id. at 27–28.
921 See id. at 27.
922 See id. at 30–31.
923 See Pomerance, supra note 884, at 245–46.
925 See, e.g., id. at 368–69 (demonstrating this principle in the real estate case of Fortner Enterprises v. United States Steel Corp.).
926 See Bronner, supra note 906, at 71–72.
928 See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 324 (1990) (“I did object to the ruling in Harper v. Virginia State Board of Elections, which struck down a small poll tax in a case where racial discrimination was not even alleged, thus rewriting the Constitution and overturning years of consistent precedent.”).
jurisprudence in legislative reapportionment cases “runs counter to the text of the [F]ourteenth [A]mendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula.” He referred to *Roe v. Wade*, the Court’s 1973 decision recognizing a woman’s constitutional privacy right to an elective abortion, as “an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority.”

Yet Bork reserved his most pointed comments for civil rights measures. In one article stating that welfare rights were nowhere to be found in the Constitution, Bork stated that it was “quite dubious” that “the poor [and] the black are underrepresented politically.” “The poor and the [black] have had access to the political process and have done very well through it,” Bork declared, justifying his assertion by noting that the United States now provided minorities and poor persons with “civil rights laws of all kinds.”

While Bork delivered a separate statement deeming racial classifications “invidious,” he consistently chastised most statutes and judicial decisions dealing with regulations in this area as “liberal shibboleth.” Legislation banning racial discrimination by owners of public accommodations received condemnation from Bork on the grounds that such a law breached the “personal liberty” of business owners. Activist judges, in Bork’s opinion, frequently distorted the Equal Protection Clause to shield certain groups “justified only by the sentimentalities or the morals of the class to which these judges and their defenders belong.” Affirmative action, to Bork, would create a new ethos of group entitlement. In one D.C. Circuit opinion, he held that the Constitution did not recognize a “right to engage in homosexual conduct and that, as judges, we have no warrant to create one.”

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934 Id.
936 See Gillers, *supra* note 908, at 36.
937 Id. at 46.
Rights Act of 1964, Bork wrote that the legislation amounted to state coercion that infringed upon individual freedoms of opinion.940 “That is itself a principle of unsurpassed ugliness,” he concluded.941

Last, Bork took strong public stances about the functioning of the Supreme Court itself. According to Bork, the Court had engaged for decades in “judicial excesses” that he longed to temper.942 “Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution,” he wrote one year before Reagan nominated him to the Court.943 Known as an originalist judge, he stated that the Court had decided dozens of decisions without regard to the Constitution’s plain language and history.944 An originalist Justice such as himself, Bork wrote, “would have no problem whatever in overruling” such cases.945

Public Sentiment Regarding Nominee: Forty-five minutes after Reagan announced the nomination, Senator Edward Kennedy released a statement, proclaiming:

Robert Bork’s America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids . . . and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.946

Shortly thereafter, Reagan offered a rebuttal: “No man in America, and few in our history, [has] been as qualified to sit on the Supreme Court as Robert Bork.”947

The battle of public opinion regarding Bork’s nomination played out in much the same way, with strongly worded rhetoric carrying...
the day.948 Nobody appeared to remain neutral or indifferent about Bork’s fitness for a position on the Court.949 Mainstream media articles and law review analyses contained strong views on both sides.950 A parade of law professors testified before the Senate Judiciary Committee regarding Bork.951 Owen Fiss, Laurence Tribe, Cass Sunstein, Ronald Dworkin, David Richards, and Kathleen Sullivan were among the professors speaking against Bork.952 Daniel Meador, John Simon, George Priest, Henry Monaghan, A. Leo Levin, and Thomas Sowell were among the academics who testified in Bork’s favor.953 At least three former American Bar Association presidents spoke in favor of Bork’s confirmation.954 At least two former American Bar Association presidents called publicly for Bork’s rejection.955

After a three-month campaign before the Senate and the eyes of the nation, Bork ultimately came out on the losing end of the fight, rejected by a vote of 58-42.956 In the opinion of many observers, it was the most visible and bitter confirmation struggle regarding a Supreme Court nominee in the nation’s history.957 Bork served for

948 See, e.g., Pomerance, supra note 884, at 222, 223, 224.
949 See id.
950 See id. at 222–23; see also Bronner, supra note 883 (discussing in considerable detail the public battle that stretched beyond political and legal leaders into surprising realms such as Hollywood).
955 See Greenhouse, supra note 952. In the realm of pop culture, even celebrated movie star Gregory Peck got into the act, recording a widely disseminated commercial opposing Bork. See PFAWdotorg, 1987 Robert Bork TV Ad,Narrated by Gregory Peck, YOUTUBE (July 16, 2008), http://www.youtube.com/watch?v=NpFe10kF3Y.
another year on the D.C. Circuit and then resigned, devoting the remainder of his life to criticizing the Court’s “activist judges” with even more fervor than before.\footnote{See Pomerance, supra note 884, at 224; John Yoo, Taming Judicial Activism: Judge Robert Bork’s Coercing Virtue, 80 U. CHI. L. REV. DIALOGUE 257, 260 (2013).} Reagan pledged that he would nominate a jurist who “will share Judge Bork’s belief in judicial restraint—that a judge is bound by the Constitution to interpret laws, not make them.”\footnote{Pomerance, supra note 884, at 224.} Ultimately, he settled on the U.S. Court of Appeals for the Ninth Circuit Judge Anthony Kennedy, a man whom Reagan said “seems to be popular with many senators of varying political persuasions.”\footnote{Linda Greenhouse, Reagan Nominates Anthony Kennedy to Supreme Court, N.Y. TIMES (Nov. 12, 1987), http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html?pagewanted=all. Following Bork’s rejection, Reagan nominated D.C. Circuit Judge Douglas Ginsburg, another jurist who praised the philosophies of strict construction and “judicial restraint.” However, Ginsburg never even made it to the Senate for advice and consent, as Ginsburg withdrew his name just ten days later after evidence showing that he had smoked marijuana with his students while teaching at Harvard appeared in the news. See John M. Broder, Collapse of the Ginsburg Nomination: At the End, Ginsburg Stood Alone—And Still a Puzzle, L.A. TIMES (Nov. 8, 1987), http://articles.latimes.com/1987-11-08/news/mn-21569_1_doug-ginsburg; United Press International, President on Offense for Nominee, SUN SENTINEL (Nov. 1, 1987), http://articles-sun-sentinel.com/1987-11-01/news/8702030074_1_senate-judiciary-committee-confirmation-nomination. Only after this second failure to nominate a judge to fill Powell’s seat did Reagan turn to Kennedy. Greenhouse, supra note 960.} On this last matter, Reagan was unquestionably correct. Kennedy, the man who is the least predictable voter on today’s Court, received unanimous confirmation from the members of the Senate.\footnote{See Supreme Court Nominations, supra note 17.}

III. TRENDS AND PATTERNS IN SENATE REJECTIONS OF UNITED STATES SUPREME COURT NOMINEES

A. Party Disloyalty

From the outset, one would reasonably assume that most rejections occur when the majority political party in the Senate differs from the nominee’s political party. Indeed, many recent critiques about the confirmation of Supreme Court Justices focus on the apparent politicization of this process.\footnote{See, e.g., Shannen W. Coffin, On Scalia and the Politics of His Replacement, NAT’L REV. (Feb. 14, 2016), http://www.nationalreview.com/corner/431295/politicization-nomination-process; Jamie Fuller, Have American Politics Killed the Impartial Supreme Court?, WASH.} In light of such
criticisms, one would expect that the Senate’s actions toward Supreme Court nominees would be an area in which battle lines are drawn along party lines.

Surprisingly, however, this article demonstrates that the inverse may be true. Ten of the twelve rejected nominees were turned away by a Senate controlled by the same political party as the nominee.963 In nine of these twelve situations, both the President and the nominee belonged to the same party that maintained the Senate’s majority.964 Only Carswell and Bork were voted down by a Senate in which a political party other than their own held the preponderance of the seats.965 The remaining ten nominees saw enough senators cross party lines to prevent a member of their own party from ascending to the federal judiciary’s highest tribunal.966

A closer examination reveals one potential explanation for this phenomenon. Many of the nominees were rejected in years when significant divisions arose within the political parties in power.967 One can see this in the High Federalist versus Moderate Federalist split during Rutledge’s nomination, the growing disunity within the Democratic-Republicans at the time of Wolcott’s nomination, the severance of Whig ties with President Tyler and his allies around the time when Spencer was nominated, the intra-party divides over states’ rights, slavery, and geographic loyalties in the years surrounding Black’s nomination, and the rise of the Radical Republican faction at the time when the Senate considered Hoar’s nomination.968

Similarly, plenty of Democrats turned their back on Cleveland, a fellow Democrat, over economic disputes.969 On the other side of the aisle, the same thing happened to Hoover with certain “progressive” Republicans who had grown weary of national policies and Court decisions constantly protecting the interests of big businesses.970

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963 See supra Part II.
964 See supra Part II.
965 See supra Part II.
966 See supra Part II.
967 See supra Part II.
968 See supra Parts II.A, II.B, II.C, II.E, II.F.
969 See supra Parts II.G, II.H.
970 See supra Part II.I.
Based on this, one can infer that the likelihood of a Senate rejection increases when deep divides exist at the national level within one or more political parties. Such a trend is particularly noteworthy at present. An extremely contentious 2016 primary season seemed to rip open the wounds of division among both Democrats and Republicans.\textsuperscript{971} This factionalism could spill over into Senate debates regarding Supreme Court nominees in the next four years. For instance, Tea Party Republicans could break ranks with moderate Republicans.\textsuperscript{972} On the other side of the aisle, strong liberals could split from more middle-of-the-road Democrats about whether a particular nominee is “progressive enough.”\textsuperscript{973} The history examined in this article demonstrates that such strained intra-party relationships could sink a Supreme Court nominee regardless of that nominee’s political party and irrespective of what political party controls the other branches of the federal government.

\textbf{B. Timing Questions}

In early 2016, the Senate’s refusal to entertain President Obama’s nomination of Judge Merrick Garland to replace Justice Scalia instigated questions about whether the Senate should ever confirm a nominee at the end of a President’s term.\textsuperscript{974} On certain occasions throughout America’s past, the Senate followed the course that it adopted in 2016 regarding a late-term nomination to the Court,

\textsuperscript{971} See, e.g., supra notes 1–4 and accompanying text.


\textsuperscript{974} See Barack Obama, supra note 9.
simply refusing to take any action whatsoever regarding the nominee.975

In the realm of Senate rejections, however, the amount of time between the President’s nomination and the next presidential election rarely appears to carry particular importance. Seven of the ultimately rejected Court nominees—Woodward, Hoar, Hornblower, Peckham, Parker, Haynsworth, and Carswell—were nominated with two or more years remaining before the next presidential election, but were declined by the Senate anyway.976

In a couple of the nominations studied here, though, the length of time until the next presidential election did play a key part. Particularly noteworthy was the role of proximity to the next presidential administration in Black’s nomination, where leading journalists and politicians announced that they would automatically reject any nominee put forth by President Buchanan, as Lincoln was just weeks away from entering the White House.977 The relatively short amount of time remaining before the next election likely played a pivotal part in the Senate’s rejection of Spencer, too, as many senators hoped to simply run out the clock until someone other than Tyler could appoint the new Justice.978

Overall, however, the majority of the rejected nominees had plenty of time between their nominations and the next presidential election.979 In addition, many of these individuals were one of the sitting President’s earliest selections for the Court. Wolcott, Spencer, Woodward, Hoar, and Hornblower all were the first nominee from their respective President’s term of office.980 The only rejected nominees from a President who had already sent multiple nominees to the Senate were Rutledge, as Washington had already


976 See Supreme Court Nominations, supra note 17.

977 See supra Part II.E.

978 See supra Part II.C.

979 See Gregor Aisch et al., Supreme Court Nominees Considered in Election Years Are Usually Confirmed, N.Y. TIMES, http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html (last updated Mar. 16, 2016); see also Daniel Victor, Election-Year Supreme Court Nominations Are Rare, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/election-year-nominations-are-rare/ (discussing that there have only been five Supreme Court nominations during a presidential election in the last one hundred years).

980 See Supreme Court Nominations, supra note 17. Cleveland successfully nominated Melville Fuller and Lucius Lama to the Court during his first term in office. See id. However, Hornblower was Cleveland’s first nominee after defeating Benjamin Harrison in 1892 for his second stint in the White House. See id.
chosen multiple justices for the Court, and Bork, as Reagan had successfully appointed three Supreme Court Justices prior to Bork’s nomination.981

Perhaps this pattern signifies that Presidents frequently lack savvy in dealing with the Senate at the time of their first Court nomination. Indeed, many Presidents rebound from a Senate rejection to attain future success with their Court nominees. For instance, after the Senate rejected Hoar, Grant nominated William Strong, Joseph Bradley, Ward Hunt, and Morrison Waite, all of whom were confirmed.982 After the Senate turned down both Haynsworth and Carswell, Nixon’s nominations of Harry Blackmun, Lewis Powell, and William Rehnquist all gained Senate approval.983 Sometimes, this subsequent success resulted from the President’s eventual acquiescence to interests held by key voting blocs in the Senate.984 On other occasions, it came from a switch in the voting of certain Senate members, or from the existence of new alliances between the White House and particular senators, or even from a change in personnel within the Senate.985 For all of these reasons, Presidents are less likely to prevail when the individual before the Senate is the President’s first or second nominee to the Court.

C. Partisan Shifts in Membership

Considering the degree to which the Supreme Court can reshape national policy through its decisions, one might believe that Senate rejection might be more likely if the nominee belonged to a political party different than his or her predecessor. With only nine

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981 See id., supra Parts II.A, II.L.
982 See Supreme Court Nominations, supra note 17.
983 See id.
984 For example, one can see this in Polk’s successful nomination of Robert Grier, who gained Senator Simon Cameron’s approval, after Cameron led the charge to reject Woodward. See supra Part II.D. One can witness this also in Cleveland’s nomination of Edward White, a southerner with no known ties to northern business deals or New York City politics, after Senator Hill from New York successfully fought against both Hornblower and Peckham. See supra Parts II.G, II.H. Hoover found success nominating Owen Roberts, a nominee with a record that was more favorable to labor interests than Parker’s record suggested. See supra Part II.I. Reagan’s nomination of Anthony Kennedy did not engender anything close to the level of controversy that Bork’s nomination had sparked. See supra Part II.L.
985 For instance, the Whig-controlled Senate surprisingly changed course in 1845 and confirmed Samuel Nelson by a voice vote, ending the yearlong blockade on Tyler’s nominees to the Court. See Supreme Court Nominations, supra note 17; supra Part II.C. Grant’s relationship with the Senate improved following Hoar’s rejection, and was measurably better by the time Grant made his subsequent Court appointments. See Supreme Court Nominations, supra note 17; supra Part II.F.
members, each new appointment can tilt the entire Court’s balance and direction. When a nominee’s party membership is the opposite of the jurist whom he or she is replacing, one would logically assume that such a nomination would receive enhanced scrutiny and attract additional controversy.

Of the twelve rejected nominees, however, only five would have replaced a Justice from an opposing political party if confirmed.\textsuperscript{986} Correspondingly, the majority of the rejected nominees would not have altered the Court’s partisan balance if the Senate had granted them the opportunity to serve.\textsuperscript{987} Considering that all but two of these nominees faced a Senate led by members of the nominee’s political party, the party members who voted against nominees from the same political party as their predecessors took an unexpected risk. By doing so, these senators risked a balance-altering appointment of a jurist from a rival party rather than preserving a seat on the Court that already belonged to one of their members.\textsuperscript{988} The fact that party members would sacrifice this rare and important opportunity strongly indicates that other factors were at work in the decision-making process about these matters, as discussed in greater detail in the following sections.

\textbf{D. Competence to Serve}

The most fundamental question that one can ask of a Supreme Court nominee is whether he or she possesses the competence to serve in this position.\textsuperscript{989} With this in mind, it is worth briefly examining whether any of the twelve rejected nominees genuinely lacked the ability to properly carry out the duties expected of a Justice on the Court.

Records demonstrate that Wolcott seemed to fall into this
category, partly because of his lack of any notable legal experience and partly because of his blatant willingness to put the Democratic-Republican Party above the interests of the nation overall. 990 One could also make a compelling case for Carswell, based largely on the fact that appellate courts devoted a considerable amount of time to undoing so many of the decisions that Carswell rendered during his years as a federal district court judge. 991 A number of newspapers and politicians claimed that Rutledge had gone insane and lacked the mental capacity to serve. 992 but it is difficult today to determine whether these allegations were anything more than partisan attacks.

Overall, however, the vast majority of these twelve rejected nominees possessed credentials, skill sets, and apparent abilities that strongly suggest their fitness to serve on the Court. For many of these individuals, even the smear campaigns waged by their political enemies could not convince the public that the nominee was not qualified for the job, proving that the nominee’s confirmation likely would not have harmed the Court or the nation. 993 The number of times is few that the senators actually used incompetence or lack of qualifications as an on-the-record justification for rejecting any of these nominees. 994 Therefore, the senators who voted against most of these nominees did not do so because the nominees were unqualified to serve. 995 Other issues and factors had to drive the decisions to keep these individuals off the Court.

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990 See supra Part II.B.
991 See supra Part II.K.
993 For example, Spencer received widespread public approval, despite the efforts of the anti-Tyler Whigs to publicly pain him as a nominee who could not be trusted. See supra Part II.C. The press generally praised Woodward’s legal acumen in spite of Senator Cannon’s ultimately successful campaign against him. See supra Part II.D. Hoar received widespread acclaim, with many commentators of the day accurately recognizing his rejection as the work of legislators who disliked Hoar’s dogged push for civil service reform and his influence over Grant. See supra Part II.F. Likewise, both of Cleveland’s nominees gained consistent public praise, with media outlets understanding that their rejection occurred because of Senator Hill’s grudges rather than a lack of qualifications from either Hornblower or Peckham. See supra Parts II.G, II.H. Parker, too, received substantial praise for his legal background and experience even after the questions about his views on labor and civil rights issues became a concern. See supra Part II.J.
994 See supra Part II.
995 See supra Part II.
E. Going Local

Several rejected nominees became victims of seemingly localized issues that expanded onto the national stage. For instance, Wolcott’s “robust” enforcement of the Embargo Act at his customs house in Connecticut became a lynchpin for the nominee’s unpopularity before the Senate, spurred on by hostile reports about Wolcott in the Connecticut newspapers. Woodward’s habit of making local enemies while engaging in the acrimonious infighting of Pennsylvania Democratic politics came back to haunt him when Senator Cameron almost singlehandedly blocked his confirmation. Hornblower and Peckham’s work on the New York City Bar Association committee that blocked Isaac P. Maynard’s path to the New York State Court of Appeals gave Senator Hill reason enough to launch successful campaigns against both nominees. A single speech in the North Carolina gubernatorial race was enough for the NAACP to mount a fierce opposition against Parker.

An important lesson rests within this particular pattern. Often, Supreme Court candidates are presented to the public through a national lens, with particular emphasis about the candidate’s apparent views on some of the weightiest issues of the day. Individuals reviewing a particular nominee, however, must perform particularly diligent legwork on the local level, learning whether the nominee has committed inappropriate acts, created enemies or formed rivalries, or engaged in any other practices that could resurface after his or her nomination. Outside the context provided by this article, one might not believe that the actions of Wolcott, Woodward, Hornblower, Peckham, and Parker in their home states were particularly egregious or even noteworthy. In each case, however, these acts were enough to spark an opposition movement against the nominee that ultimately led to his or her defeat.

F. Supreme Court Nominees as Political Pawns

In a number of situations examined in this article, members of

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996 See supra Part II.
997 See supra Part II.
998 See supra Part II.
999 See supra Part II.
the Senate seemed far more interested in opposing the President of the United States than focusing on the merits of a particular nominee. The Whig-controlled Senate’s rejection of Spencer was one such example: a tool for Henry Clay and his allies to further ostracize President Tyler for striking down the National Bank.\textsuperscript{1001} The Senate’s opposition of Hoar focused on punishing Hoar for recommending that the White House select new circuit court judges without engaging in political patronage and punishing President Grant for listening to Hoar.\textsuperscript{1002} The unpopularity of some of President Cleveland’s economic policies played a paramount role in Senator Hill garnering support for the rejection of Hornblower and Peckham.\textsuperscript{1003} The rejection of Haynsworth and, to a lesser extent, Carswell originated with certain senators growing furious over the way that President Nixon handled the investigation and resignation of Justice Fortas.\textsuperscript{1004}

Such situations illustrate the degree to which Supreme Court nominees can become political pawns. Given the rarity of Court vacancies and the long-term impact of a Court appointment, senators possess the ability to embarrass the White House by rejecting the President’s choice. Certainly, the Senate’s power of advice and consent plays an important checks and balances role, restricting the executive branch from absolute control over the judiciary.\textsuperscript{1005} However, when elected legislators use that power to strike down a Court nominee primarily to seek political vengeance upon a particular President, the checks and balances system fails under the weight of such abuse. As this article shows, several potential justices lost their opportunity to serve on the Court because they were caught in the political cross-fire of fights beyond their control.

\textit{G. Limited-Issue Rejections}

As already noted, most of the twelve rejected nominees were not rebuffed because they were incompetent jurists. A closer look demonstrates that the majority of these individuals were ultimately turned down because of their stances on only one or two key issues. For instance, Rutledge’s rejection occurred almost solely because his

\textsuperscript{1001} See supra Part II.C.
\textsuperscript{1002} See supra Part II.F.
\textsuperscript{1003} See Pierce, supra note 522, at 557; supra Parts II.G, II.H.
\textsuperscript{1004} See supra Parts II.J, II.K.
speech against Jay’s Treaty enraged several highly influential members of the Federalist Party.\textsuperscript{1006} The Radical Republicans coalesced against Hoar because they disliked his opinions about civil service reform.\textsuperscript{1007} Black was turned away because of his well-known opinions regarding states’ rights and, in particular, slavery.\textsuperscript{1008}

Remarkably, one can even link the bulk of these rejections to the nominee’s views (real or perceived) in at least one of two categories. The first of these categories is the nominee’s stance on the nation’s business interests. The primary issue raised against Wolcott was the extent to which he enforced the Embargo Act.\textsuperscript{1009} Woodward was painted as an avowed free trade man who would immediately declare any protective tariff unconstitutional.\textsuperscript{1010} Hornblower and Peckham were billed by their adversaries as reflexively pro-business disciples of Cleveland.\textsuperscript{1011} Parker’s holding in the United Mine Workers case caused the American Federation of Labor to declare that the nominee obviously supported yellow-dog contracts, strike breaking, unjust working conditions, and all things anti-labor.\textsuperscript{1012} Haynsworth received similar condemnation as an “anti-union” nominee, as did Bork.\textsuperscript{1013}

The other issue at the center of many of the rejections is civil rights. The origins to the importance attached to this topic emerged with the debates over Black’s nomination, which ultimately failed because of Black’s acceptance of legalized slavery.\textsuperscript{1014} More recently, however, the subject has evolved into a principal reason for rejecting Supreme Court nominees. All of the twentieth century rejections—Parker, Haynsworth, Carswell, and Bork—occurred largely because of the nominee’s purported civil rights stances.\textsuperscript{1015} In each case, revelations that the nominee apparently held prior interests that were hostile to civil rights initiatives—ranging from integration of public schools to suffrage for African Americans to affirmative action programs—proved pivotal in many senators’ decisions to vote against the nominee.\textsuperscript{1016}

\textsuperscript{1006} See supra Part II.A.
\textsuperscript{1007} See supra Part II.F.
\textsuperscript{1008} See supra Part II.E.
\textsuperscript{1009} See supra Part II.B.
\textsuperscript{1010} See supra Part II.D.
\textsuperscript{1011} See supra Part II.G.
\textsuperscript{1012} See supra Part II.I.
\textsuperscript{1013} See supra Parts II.J, II.L.
\textsuperscript{1014} See supra Part II.E.
\textsuperscript{1015} See supra Parts II.I, II.J, II.K, II.L.
\textsuperscript{1016} Interestingly, the Senate during the twentieth century never rejected a Court nominee
Regardless of whether members of the Senate genuinely consider a Supreme Court nominee’s views about labor rights and civil rights to be of paramount importance, or whether these senators simply believe that voting for someone who has been branded either anti-labor or anti-civil rights reform would damage their re-election chances, the bottom line is clear. If recent history is any indication, a nominee who loses the support of either the nation’s labor leaders or the nation’s civil rights leaders faces an enhanced likelihood of rejection, even if that individual faces no other form of significant opposition. A nominee who receives poor marks from both civil rights groups and labor organizations will be even harder to confirm, regardless of that nominee’s other viewpoints and qualifications.

IV. CONCLUSION

After an extremely volatile and divisive presidential race that raised plenty of questions about the Supreme Court’s future, attention now shifts to what President Trump will actually do in the next four years regarding the federal judiciary’s preeminent tribunal. By itself, selecting a replacement for Scalia represented a watershed moment for the Court. If Ginsburg, Kennedy, and Breyer decide to retire within the next four years, President Trump will become the first to select four new Justices for the Court since Reagan. Thus, the Court could become extraordinarily different in its voting patterns during the years before the next presidential election, a shift that could alter the Court’s tendencies for decades to come.

Of course, any appointees to the Court must first receive the Senate’s consent. While rejections are rare, this article demonstrates that they can occur at seemingly unexpected times. As the trends examined in this article show, the many intra-party factions that presently exist in Congress only amplify the likelihood that this Senate could decide to vote against President Trump’s nominees. Therefore, the President must exercise even great-than-
customary care in deciding whom to put before the Senate for review in the next four years.

Studying the twelve rejected nominees, certain patterns emerged about which the President would do well to take heed. Declaring simply that a nominee possesses a strong background and an excellent legal skill set is not enough to ensure the Senate’s consent. Likewise, relying on support from the President’s own party or the nominee’s own party is far from a guarantee.

With this in mind, examining the nominee’s prior dealings and reputation on the local level becomes extremely important, searching for any improprieties, rivalries, or controversial statements or actions that could resurface during the confirmation process. The nominee’s past interactions with presently serving senators, and with friends of those senators, also deserve scrutiny, as a single powerful senator repaying a grudge could shift the tide of the entire chamber regarding a nominee’s chance of success. Gauging the reactions of labor organizations and civil rights leaders is also essential, as the chances of a nominee’s rejection increase considerably without support from either of these groups.

Of course, this article also demonstrated that all of these considerations can go for naught if enough senators decide to leverage the Supreme Court’s future as a method of attacking the President. Supreme Court nominees have turned into political pawns before, rejected primarily because of a tug-of-war between the executive and legislative branches. Whether such a phenomenon will re-materialize during President Trump’s time in office remains to be seen.

The history of rejected Supreme Court nominees is a peculiar one, with unexpected patterns emerging and anticipated trends frequently failing to hold true. From Rutledge to Bork, the nation’s history might have changed considerably if the Senate had acted differently regarding the nominations of these twelve rejected individuals. While the Senate has not actively voted down a nominee for three decades, the specter of rejection is hardly a thing of the past. Indeed, as the nation moves into crucial years regarding the Court’s future, the question of whether the Senate decides to exercise this power—and the reasons why it chooses to do so or refrain from doing so—will be likely a matter worth watching.